Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS,

Petitioners,

v.

ANTHONY G. BICA and
JUAN SILVA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. REVIEW BY THIS COURT IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL PREEMPTION THAT AFFECT THE NATIONAL WELFARE	5
A. Introduction	5
B. The lower court incorrectly held that California Labor Code §2805 is pre-empted by federal immigration law	7
CONCLUSION	14
APPENDICES	1a
A. Memorandum Opinion of the Court of Appeal of the State of California, Second Appellate District	1a
B. Order of the Supreme Court of California denying petitioners' petition for hearing	1b
C. Relevant Statutes and Regulations	1c

TABLE OF AUTHORITIES

Cases:

California v. Zook, 336 U.S. 725 (1949)	9
Eastern Pipeline Co. v. Public Service Commission, 332 U.S. 506 (1948)	9
Florida Lime and Avocado Growers v. Paul, 373 U.S. 132 (1963)	9, 10, 11

Page

Free v. Bland, 369 U.S. 663 (1963) 9

Hines v. Davidowitz, 312 U.S. 52 (1941) 8, 11, 14

Kewanee Oil Co. v. Bicron Corp., ____ U.S. ____, 40 L.Ed. 2d 315 (1974) 2, 8, 9, 14

Nozewski Polish Style Meat Products v. Meskill, 376 F.Supp. 610 (D.Conn. 1974) 8

Retail Clerks International Assn. v. Schermerhorn, 375 U.S. 96 (1963) 9

Saxbe v. Bustos, 43 USLW 4017 (November 26, 1974) 15

Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966) 11

Statutes and Regulations:

California Labor Code §2805 ..... 2, 3, 4, 5, 7

California Administrative Code, Title 8, Part 1, Chapter 8, Article 1 §§16209.6 14

Connecticut General Statutes § 31-51k 8

Kansas Statutes Annotated § 21-4409 8

7 U.S.C. § 2044(b)(6) 13

8 U.S.C. § 1101(a)(15)(H) 10, 14

8 U.S.C. § 1182(a)(14) 11

8 U.S.C. § 1324(a)(4) 13

20 CFR § 602.10(e)(5) 12, 13

45 CFR § 233.50 13

45 CFR § 248.50 13

Articles:

Greene, *Immigration Law and Rural Poverty – The Problems of the Illegal Entrant*, 1969 Duke L.J. 475 5

Note, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, So. Calif. L.R. 567 (1973) 5

IN THE

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No.

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS,

Petitioners,

v.

ANTHONY G. BICA and
JUAN SILVA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the California Court of Appeal, Second Appellate District entered in the above-entitled case on July 26, 1974, petition for hearing to the Supreme Court of California denied on October 24, 1974.

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District is set out in Appendix A, and is reported at 115 Cal. Rptr. 444 (1974). The order of the Supreme Court of California denying petitioners' petition for hearing is set out in Appendix B.

JURISDICTION

The judgment of the Court of Appeal was entered on July 26, 1974, and a petition for hearing was denied by the Supreme Court of California on October 24, 1974. This petition for writ of certiorari was filed within 90 days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Did the lower court fail to apply the principles recently announced by this Court in *Kewanee Oil Company v. Bicron Corp.*, ____ U.S. ____, 40 L.Ed.2d 315 (1974) by invalidating state legislation which touches on, but does not conflict with, federal law?

2. Is California Labor Code § 2805, enacted to protect California citizens and lawful resident aliens from unemployment caused by competition from illegal aliens, constitutionally valid as a measure not in conflict with federal immigration law?

STATUTES AND REGULATIONS INVOLVED

These statutes and regulations are reproduced in Appendix C:

1. California Labor Code § 2805.
2. California Administrative Code, Title 8, Part 1, Chapter 8, Article 1 § § 16209 through 16209.6.
3. Connecticut General Statutes § 31-51k.
4. Kansas Statutes Annotated § 21-4409.
5. 7 U.S.C. § 2044(b)(6).
6. 8 U.S.C. § 1101(a)(15)(H).
7. 8 U.S.C. § 1182(a)(14).
8. 8 U.S.C. § 1324(a)(4).
9. 20 CFR § 602.10(e)(5).
10. 45 CFR § 233.50.
11. 45 CFR § 248.50.

STATEMENT OF THE CASE

This litigation began when petitioners, migrant farmworkers, commenced an action pursuant to California Labor Code § 2805[1] in the Superior Court for

[1] California Labor Code § 2805 provides:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a)."

the County of Santa Barbara on October 24, 1972. Generally, the complaint alleged that petitioners had performed satisfactory employment for respondents as farmworkers from June 5, 1972 through September 28, 1972; that petitioners were lawful residents and lawful workers at all times; that on or about September 28, 1972 and at all times thereafter respondents refused employment to petitioners on the ground that respondents had a surplus of labor; that part of said labor supply consisted of aliens illegally present in this country; that respondents are open and notorious employers of illegal aliens and encouraged illegal aliens to compete with local workers for jobs in order to depress local wages and working conditions; and that respondents' practices constituted the knowing employment of aliens not legally admitted to lawful residence in the United States which has an adverse effect on lawful resident workers in violation of California Labor Code § 2805(a) and (c). Petitioners sought their reinstatement to employment by respondents and a permanent injunction against respondents' willful employment of illegal aliens.

On February 14, 1973, the trial court declared California Labor Code § 2805 unconstitutional for the reason that the challenged statute was preempted by federal immigration law. Petitioners appealed this ruling to the California Court of Appeal, Second Appellate District, and on July 26, 1974, the appellate court affirmed the trial court's decision.[2] Petitioners filed a petition for hearing to the Supreme Court of California, and on October 24, 1974 said petition was denied. This

[2] 115 Cal. Rptr. 444 (1974)

timely petition for writ of certiorari seeks review from the Court of Appeal's decision invalidating California Labor Code § 2805 as preempted by federal immigration law.

REASONS FOR GRANTING THE WRIT

I.

REVIEW BY THIS COURT IS NECESSARY TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL PREEMPTION LAW THAT AFFECT THE NATIONAL WELFARE.

A. Introduction

At issue in this action is the constitutionality of a statute of great public importance, a statute fashioned to protect citizens and lawfully resident alien workers from unfair competition by illegal aliens in California. That the problem is of great public importance cannot be doubted.[3] For example, the United States Border Patrol in Southern California has averaged approximately 11,000 apprehensions of illegal aliens each month. The Border Patrol annually apprehends more than 600,000 illegal aliens in the United States, approximately 95 percent are of Mexican national origin. (*Washington Post*, December 9, 1973, p. 16) The U.S. Attorney General recently stated that illegal aliens now hold at least a million jobs in the United States

[3] See generally, Note, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, 46 So.Calif.L.R. 567 (1973), See also, Greene, *Immigration Law and Rural Poverty – the Problems of the Illegal Entrant*, 1969 Duke L.J. 475.

and that the Immigration and Naturalization Service can no longer cope with the flow.

The problems of illegal aliens is particularly acute in California where the employment of illegals is virtually unchecked producing drastic effects both on low income and minority residents who are displaced, and on the local economies which suffer a "wage drain" into Mexico.[4]

A report by the Committee on Labor and Public Welfare of the United States Senate articulates the problem:

> The problems created by the commuter immigrant and illegal entrant are manifest. The Mexican aliens, as a group, are a readily available, low-wage work force which undermines the standards American workers generally enjoy throughout the rest of the country. More importantly, the normal play of free enterprise principles is subverted and prevented from operating to develop standards along the border commensurate with the American standard. This prognosis is made distressingly clear by looking at the poor working and living conditions that are rampant in areas of our country along the Mexican border. So long as Mexican aliens are allowed indiscriminately to work in the American economy, and take their wages back to the low-cost Mexican economy, the growth of the American standards will continue to be stultified. (The Migratory Farm Labor Problem in the United States, Report No. 91-83, 1969).

[4] I.N.S. estimates there are currently 8 million illegal aliens in the country. Another report estimates illegals cause a wage loss to American citizens of $10 billion annually. (*Washington Star-News*, January 11, 1975, p. A-8).

The United States Department of Labor has summarized how persons illegally present in this county (1) take jobs which would normally be filled by American citizens; (2) depress the wages and impair the working conditions of American citizens; (3) increase the burden of American taxpayers through added welfare costs; (4) reduce the effectiveness of employee organizations; (5) secure jobs, services, and resources directly and indirectly from many federal and state programs, thus diverting scarce resources from American citizens; and (6) constitute for employers an unskilled group rich for exploitation–aggressive, enterprising workers with low-wage demands. (U.S. Department of Labor, Manpower Administration, Statement before the House Subcommittee on Immigration and Nationality, June 19, 1971.)

Thus, without an adjudication of the constitutionality of California Labor Code § 2805, a continuing employment of illegal aliens will render jobless thousands of lawful workers in the state; their families will be reduced to penury and possibly forced onto public assistance.

B. The lower court incorrectly held that California Labor Code § 2805 is preempted by federal immigration law.

Labor Code § 2805 was adopted by the California Legislature in 1971 because of a growing concern with the massive numbers of illegal aliens residing and working in California and the resulting displacement of citizens and lawful resident aliens who were forced into

unemployment and onto the welfare rolls.[5] The crux of the ruling in the California Court of Appeal is that Section 2805 of the California Labor Code touches on the area of federal immigration law and therefore is invalid *per se*, even though both state and federal law may serve the common purpose of protecting lawful residents from job displacement by illegal alien workers. In so holding, the state court failed to apply the principles set forth by this Court in *Kewanee Oil Co. v. Bicron Corp.*, ____ U.S. ____, 40 L.Ed. 2d 315 (1974): that while federal legislation manifesting a Congressional intent to occupy a field exclusively precludes a state from legislating directly in that same field, nonetheless, state legislation in one area which coincides with federal legislation in another area remains valid absent proof of actual conflict between the two.

This Court in *Kewanee Oil Company, supra*, upheld a state trade secret law overlapping a federal law under the Patent Clause of Article I, section 8. This Court upheld the state law in the face of challenges that the entire area was preempted by Congress' exclusive power to regulate patents, and that actual conflict existed between state and federal law. For example, the state law provided for trade secret protection in perpetuity to patentable inventions which were protectable for only 17 years under a federal patent. This Court relying on *Hines v. Davidowitz*, 312 U.S. 52 (1941) instead

[5]Other states have expressed similar concerns by enacting legislation prohibiting the knowing employment of illegal aliens: Kan. S.A. § 21-4409; Conn. Gen. Stats. § 31-51k. However, the Connecticut statute appears to have been declared unconstitutional on federal preemption grounds in *Nozewski Polish Style Meat Products v. Meskill*, 376 F.Supp. 610 (D. Conn. 1974).

looked to the more fundamental question of conflict between the basic purposes of the state and federal laws:

> The question of whether the trade secret law of Ohio is void under the Supremacy Clause involves a consideration of whether that law *stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . . supra* at 324. (Emphasis added)

Disapproving the automatic "coincidence means invalidity" theory, this Court repeatedly has warned that its use would mean "setting aside great numbers of state statutes to satisfy a Congressional purpose which would be only the product of this Court's imagination." *California v. Zook*, 336 U.S. 725 (1949) (state regulation of travel bureaus not preempted by federal laws regulating interstate commerce); see also *Panhandle Eastern Pipeline Company v. Public Service Commission*, 332 U.S. 506, 523-524 (1948) (dual rate regulations by state and federal governments upheld); *Free v. Bland*, 369 U.S. 663, 666 (1962) (upholding state community property rights under Treasury regulations affecting savings bonds); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963) (state law defining avocado maturity not preempted by federal commerce regulations); and *Retail Clerks Internat'l. Assn. v. Schermerhorn*, 375 U.S. 96, 105 (1963) (upholding state labor law not preempted by federal labor law).

The question at issue here, therefore, is whether there is "evidence of a congressional design to preempt the field", or, in the absence of such evidence, whether there is "such actual conflict between the two schemes

of regulations that both cannot stand in the same area". *Florida Lime and Avocado Growers, Inc. v. Paul, supra* at 141.

Nothing whatsoever in the language or history underlying federal immigration legislation indicates a Congressional intent to preempt the field to the extent of prohibiting the states from adopting labor or general welfare legislation coincidental with federal immigration law. The test is whether there exists an unresolvable conflict between federal immigration laws and § 2805. An analysis of the two legislative schemes shows not only an absence of conflict but harmony of purpose.

California Labor Code section 2805, far from conflicting with federal law, is consistent with and reinforces the basic purpose of federal legislation. Congress enacted a comprehensive law governing immigration in 1965 which repealed origin-quota provisions and substituted a system of "preferential admissions based upon the existence of a close family relationship with United States citizens or permanent resident aliens, and upon the *advantage to the United States of the special talents and skills of the immigrant*". (Emphasis added) 1965 U.S. Code Cong. & Admin. News, at 3329. A principal purpose of the new scheme was the strengthening of "safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market. . . ." *Id.*

Under the new regulatory system, the United States authorizes the importation of temporary workers from other countries *only* "if unemployed persons capable of performing such service or labor cannot be found in this country". 8 U.S.C. § 1101(a)(15)(H)(ii). Applicants

for permanent admission may be authorized only if the Secretary of Labor certifies that:

> (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . . 8 U.S.C. § 1182(a)(14).

In the absence of congressional intent to preempt state labor legislation coincidental with immigration legislation specific conflict between the state and federal laws must be shown. Stated in a different manner, preemption occurs only if "the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.' " *Florida Lime and Avocado Growers, Inc. v. Paul, supra* at 141; *Hines v. Davidowitz, supra* at 67. In applying this second test, the Court has indicated that conflicts between state and federal regulations should not be sought where none clearly exists. *Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35, 45 (1966). Congressional intent relevant to this case at bar has been to encourage and incorporate the involvement of states in the area of entry of immigrants and temporary workers:

> The Department of Labor should have no difficulty in adapting to this new [certification] procedure, inasmuch as the Department, through its Bureau of Employment Security and *affiliated state employment service agencies, presently deter-*

mines availability of domestic workers and the standards of working conditions. [Emphasis added.] 1965 U.S. Code Cong. & Admin. News, Sen. Rept. No. 748, at 3334.

Regulations adopted by the Department of Labor further illustrate the harmony of § 2805 with federal immigration law. Regulations compiled in 20 CFR § 602, for example provide precise guidelines to employers as to when the employment of a foreign worker would have an adverse effect on domestic workers. Under the regulations, temporary alien workers may be imported only after the Manpower Administrator finds:

> That the employment of such workers will not *adversely affect* the wages and working conditions of domestic workers similarly employed; and 2) that reasonable efforts have been and will continue to be made by the employment service and the employers to obtain domestic workers at wage rates and conditions of employment no less favorable than those set forth in the regulations in this part. [Emphasis added] 20 CFR § 602.10(e)(1) and (2).

Such certification should be denied if the employer "has failed to abide by any applicable state or local labor, health or housing laws". 20 CFR § 602.10(e)(3). Similarly, a denial should occur:

> Where the Immigration and Naturalization Service has notified the Secretary of Labor that the employer has *had in his employ* any *foreign worker* who was not lawfully in the United States, *unless* the employer demonstrates that he *did not know*, had no reasonable grounds to suspect, or could not by *reasonable inquiry have* ascertained

> that the alien worker was not lawfully in the United States. . . . [Emphasis added] 20 CFR § 602.10(e)(5).

Notably, petitioners could assert the same cause of action and seek the same relief under federal law as they sought under California state law, under amendments to the federal Farm Labor Contractor Registration Act, 7 U.S.C. § 2041 et seq. (P.L. No. 93-518, December 7, 1974). Enacted subsequent to the decision in the California Court of Appeal below, the Act prohibits farm labor contractors such as respondent Bica from "recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment." 7 U.S.C. § 2044(b)(6). Moreover, the amendments enable "any person claiming to be aggrieved" by a violation of any part of the act to seek legal or equitable relief in federal district court. Similar prohibitions apply to eligibility under the categorical public assistance programs under the Social Security Act, 45 C.F.R. § § 233.50 and 248.50.

Nor does conflict arise from the Immigration and Nationality Act, 8 U.S.C. § 1324(a)(4), which provides that employment by itself does not constitute the crime of harboring an alien. First, federal policy underlying the Act is not to encourage the hiring of illegal aliens, but rather "to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market." Moreover, the Act authorizes the importation of temporary workers from other countries *only* "if unemployed persons capable of performing such service

or labor cannot be found in this country". 8 U.S.C. § 1101(a)(15)(H)(ii).[6] The lack of identical remedies in the two statutes does not mean a clash of their objectives. See *Kewanee Oil Co. v. Bicron Corp., supra.*

CONCLUSION

The lower court failed to apply the proper standards under *Kewanee Oil v. Bicron Corp., supra* and *Hines v. Davidowitz, supra* as the challenged statute poses no burden or "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Given the present state of unemployment and the impact of illegal aliens on the nation's economy, review by this Court is necessary. Until Congress has expressed its intention to preempt a state's ability to legislate in this area "it is fit that the

[6]It should be noted that regulations issued by the California State Labor Commissioner totally incorporate non-immigrant aliens and any other lawfully admitted persons within the definition of "lawful resident" under § 2805. Title I C.A.C., Pt. 1, Ch.8, Art. 1, § 16209.

judiciary recuse itself." *Saxbe v. Bustos,* 43 USLW 4017, 4021 (November 26, 1974).

For the reasons stated above, petitioners pray this Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeal.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT DIVISION TWO

LEONOR ALBERTI DE CANAS and MIGUEL CANAS,
Plaintiffs and Appellants.

vs.

ANTHONY G. BICA, JUAN SILVA, DOES I through X, Inclusive,
Defendants and Respondents.

2D CIVIL NO. 42739
Sup. Ct. No. SM 11789

COURT OF APPEAL – SECOND DIST.
FILED
JUL 26 1974
CLAY ROBBINS, Jr. *Clerk*
(stamp)

APPEAL from a judgment of the Superior Court of Santa Barbara County, Marion A. Smith, Judge. Affirmed.

California Rural Legal Assistance, Inc., William D. Farber, Robert Johnstone, Cynthia Mertens, Michael Stern; Migrant Legal Action Program, Inc., Burton D. Fretz, Howard Scher, Robert S. Catz, for Plaintiffs and Appellants.

Robert L. Trapp, Jr., William S. Marrs, for Defendants and Respondents.

Plaintiffs appeal from a judgment of dismissal entered upon the sustaining of a demurrer without leave to amend their complaint for damages and injunctive relief.

The complaint in essence alleges that plaintiffs are farm workers who have been discharged from employment and have not been rehired because defendants, farm labor contractors, contend that they have a sufficient labor supply. According to the allegations of the complaint that labor supply consists of aliens who are illegally within this country and defendants knowingly hire such illegal aliens in the stead of qualified lawful residents of the United States.

Plaintiffs' attempt to obtain redress is bottomed on Labor Code section 2805, which provides criminal penalties for persons who "knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers." According to plaintiffs a violation of this statute constitutes an act of unfair competition which may be enjoined pursuant to Civil Code section 3369.[1] The claim for damages is premised

[1] Civil Code section 3369 provides in part:

"(1) Neither specific nor preventive relief can be granted to enforce a penalty of forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition.

"(2) Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction.

"(3) As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent practice . . . ."

on tortious interference with plaintiffs' right to pursue a livelihood.

The trial court's ruling on the demurrer was squarely based on its holding that Labor Code section 2805 is unconstitutional. Both sides agree that the constitutionality of that section is controlling of the issues presented.

Plaintiffs' claim to equitable relief was treated and disposed of in *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588, where the Court of Appeal, after a lengthy discourse on the conflicting policy considerations, refused to enjoin the hiring of illegal aliens and concluded that the problem was one that required the attention of the Federal government. Of course, *Diaz* was decided in 1970, prior to the enactment of Labor Code section 2805. The decision there rested on the general balancing of equitable considerations.

The question presented here is whether the result of *Diaz* is now to be rejected because the state Legislature has specifically legislated on the subject. The answer to that question in turn rests upon whether the State of California, within the framework of our system of Federalism, can properly legislate on a subject which admittedly is one of primary Federal concern. (*Hines v. Davidowitz*, 312 U.S. 52.) We think that California cannot so legislate.

Labor Code section 1850 which purported to prohibit the hiring of aliens on public works in California, was struck down by the California Supreme Court in *Purdy & Fitzpatrick v. State of California*, 71 Cal.2d 566, as being an interference with the regulatory scheme enacted by Congress to control immigration. True, section 1850 addressed itself to all

aliens whether legally or illegally within the nation's borders, while section 2805 deals only with illegal aliens. Such distinction, however, is not such as to detract from the force of *Purdy & Fitzpatrick's* strong language to the effect that in the area of immigration and naturalization, congressional power is exclusive.

The Federal Congress has the specific delegated power to regulate foreign commerce, make treaties and establish rules for naturalization and it has as an incident of national sovereignty the implied power to control the conditions for admissionof foreign nationals into the country. (*Ekiu v. United States*, 142 U.S. 651.) No area of governmental activity is more uniquely suited to Federal regulation than the control of immigration.

Pursuant to its authority, the Congress of the United States has enacted a comprehensive scheme for controlling immigration and naturalization which includes regulation of employment of aliens. (8 U.S.C., §§ 1101 et seq.) At this writing,[2] however, the Congress has not imposed upon private employers the burden of determining, in terms of the immigration laws, the status of prospective employees.

Has Congress by its inaction in this latter regard intended that such augmentation of its regulations be open to adoption by the several states? We are of the opinion that the answer is plainly "No." To the contrary, it would appear that until now Congress has

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[2] There is now pending in the United States Congress, H.R. 982 which would amend 8 U.S.C., section 1324(a) to provide a penalty for knowingly employing an alien not lawfully admitted to the United States.

specifically and intentionally declined to add sanctions to employers ot its control mechanism.

The controlling principles are set forth in United States Supreme Court decisions involving labor management disputes in which the National Labor Relations Board had declined to assert jurisdiction but had also not ceded jurisdiction to the states. In these cases it was argued that the inaction of the National Labor Relations Board created a "no-man's-land" on which the states might assert jurisdiction.

In *Guss v. Utah Labor Board*, 353 U.S. 1, it was stated at page 11, "Since Congress' power in the area of commerce among the States is plenary, its judgment must be respected whatever policy objections there may be to creation of a no-man's-land."

California's efforts to provide injunctive relief and damages to an employer who was found to have suffered from an unfair labor practice over which the National Labor Relations Board had refused to assert jurisdiction were set at naught in two opinions by the United States Supreme Court rendered in the same action. (*San Diego Unions v. Garmon*, 353 U.S. 26, and 359 U.S. 236.) The first case disposed of the injunctive relief and the second disposed of damages for tortious conduct.

In the latter case it was stated at pages 244, 256 and 247: "To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.... It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to

act.... The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.... Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.... In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict."

These holdings are clear authority for the proposition that Labor Code section 2805 either in its provision for criminal penalties or in its application in providing a basis for injunctive relief or damages is in conflict with the national law and policy. These are remedies which the Congress has withheld from the executive branch of the Federal government and thus may not be utilized by the states.

In *Dolores Canning Co., Inc. v. George W. Milias*, et al., 2d Civil No. 41729, ____ Cal.App.3d ____, filed July 17, 1974, Division V of this court, also concluded that Labor Code section 2805 is unconstitutional.

The judgment is affirmed.

COMPTON, J.

We concur:

FLEMING, Acting P.J.
BEACH, J.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 24 1974

I have this day filed Order

HEARING DENIED

In re: 2 Civ. *No.* 42739

De Canas

vs.

Bica

Respectfully,

G. E. BISHEL
Clerk

21414-877 3-74 3M OSP

APPENDIX C

STATUTES

1. California Labor Code § 2805:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a)."

2. California Administrative Code, Title 8, part 1, chapter 8, article 1 § § 16209 through 16209.6:

16209. DEFINITION OF ALIEN ENTITLED TO LAWFUL RESIDENCE.

An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form I-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorized him to work.

16209.1 INQUIRY OF APPLICANT FOR EMPLOYMENT.

In ascertaining whether an applicant for employment is not entitled to lawful residence in the United States, an employer shall, contemporaneous with the hiring, make inquiry of such applicant as to whether he is a citizen or an alien.

16209.2 INQUIRY OF EMPLOYEE.

In ascertaining whether an employee is not entitled to lawful residence in the United States, an employer shall make inquiry of such employee as to whether he is a citizen or an alien.

16209.3 APPLICANT OR EMPLOYEE CITIZEN.

If the applicant for employment or employee claims to be a citizen, he may be employed or continued in the employ of the employer upon signing a declaration under penalty of perjury that he is a citizen of the United States. An employer who knowingly employs an alien not entitled to lawful residence shall not be exonerated from prosecution for violation of Labor Code Section 2805 notwithstanding his having obtained a signed declaration of citizenship from the alien.

16209.4 APPLICANT ALIEN – REQUIREMENT OF PROOF.

If the applicant acknowledges that he is an alien, he shall be requested to produce a document which shows that the applicant is entitled to lawful residence in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The applicant shall furnish such documentation within three days from the date of employment. In the event that he fails to furnish such documentation and

employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.5 EMPLOYEE ALIEN – REQUIREMENT OF PROOF.

If the employee acknowledges that he is an alien, he shall be requested to produce a document which shows that he is entitled to reside in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The employee shall furnish such documentation within three days. In the event that he fails to furnish such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.6 DEFINITION OF ADVERSE EFFECT

Employment of an alien not entitled to lawful residence under any of the following circumstances shall be deemed to have an adverse effect on lawful resident workers:

a. Employment in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 CFR §60.6. Schedule A may be obtained from the Manpower Administration, U.S. Department of Labor, Washington, D.C.

b. Payment by an employer to such employee of less than the federal or state minimum wage, whichever is higher.

3. Connecticut Gen. Stats. §31-51k.:

§31-51k. Employment of alien not entitled to residence

(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States.

(b) Violation of the provisions of this section shall be punishable by a fine of not less than two hundred nor more than five hundred dollars and, for any subsequent offense, by the penalty for a class A misdemeanor.

(c) The labor commissioner shall, on or before October 1, 1972, promulgate regulations specifying the procedure to be followed by each employer to insure compliance with the provisions of this section.
(1972, P.A. 275, §§1 to 3, eff. May 24, 1972.)

4. Kansas Statutes Annotated §21-4409:

21-4409. Knowingly employing an alien illegally within the territory of the United States.

(a) Knowingly employing an alien illegally within the territory of the United States is the employment of such alien within the state of Kansas by an employer who knows such person to be illegally within the territory of the United States.

(b) Knowingly employing an alien illegally within the territory of the United States is a class C misdemeanor. [L. 1973, ch. 140, §1; July 1.]

5. 7 U.S.C. §2044(b)(6):

Refusal to Issue certificate suspension; revocation; refusal to renew

(b) Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor–

(6) has recruited, employed, or utilized, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment;

6. 8 U.S.C. §1101(a)(15)(H):

15) The term "immigrant" means every alien except an alien who within one of the following classes of nonimmigrant aliens–

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the aliens spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

7. 8 U.S.C. §1182(a)(14):

§1182. Excludable aliens–General Classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive

visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a) (27) (A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a) (3) and 1153(a) (6) of this title, and to nonpreference immigrant aliens described in section 1153(a) (8) of this title;

8. 8 U.S.C. §1324(a)(4):

§1324. Bringing in and harboring certain aliens; persons liable; authority to arrest

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who–

(4) Willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of–
any alien, including an alien crewman, not duly admitted

by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years or both, ...

9. 20 C.F.R. § 602.10(e)(5):
Certification and Use of Temporary Foreign Labor for Agricultural, and Logging Employment
§602.10 The certification processes.

(e) Certifications will be denied in whole or in part if the findings set forth in paragraph (d) of this section cannot be made or:

(5) Where the Immigration and Naturalization Service has notified the Secretary of Labor that the employer has had in his employ any foreign worker who was not lawfully in the United States, unless the employer demonstrates that he did not know, had no reasonable grounds to suspect, or could not by reasonable inquiry have ascertained that the alien worker was not lawfully in the United States.

10. 45 C.F.R. §233.50:
§233.50 Citizenship.
Conditions for plan approval:

(a) A State plan under title, I, X, XIV, XVI of the Social Security Act may not exclude an otherwise eligible citizen of the United States, regardless of how (by birth or by naturalization), or when, citizenship was obtained.

(b) A state plan may include all persons without regard to citizenship status. Where there is an eligibility

requirement applicable to noncitizens, a State plan may, as an alternative to excluding all noncitizens, provide for qualifying noncitizens, otherwise eligible, who have resided in the United States for a specified number of years.

11. 45 C.F.R. §248.50:

§248.50 Citizenship.

Conditions for plan approval:

(a) A state plan under title XIX of the Social Security Act may not exclude an otherwise eligible citizen of the United States, regardless of how (by birth or by naturalization), or when, citizenship was obtained.

(b) A State plan which includes the medically needy must include all otherwise eligible individuals, regardless of citizenship status, unless all of the State's approved financial assistance plans require citizenship as a condition of eligibility.

(c) A State plan may include persons without regard to citizenship status, even though all of the State's financial assistance plans contain such a requirement.

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APPENDIX

Supreme Court, U. S.
FILED
AUG 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS,

Petitioners,

-vs.-

ANTHONY G. BICA and
JUAN SILVA,

Respondents.

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE
OF CALIFORNIA SECOND APPELLATE DISTRICT**

PETITION FOR CERTIORARI FILED JANUARY 17, 1975
CERTIORARI GRANTED JUNE 23, 1975

INDEX

	Page
RELEVANT DOCKET ENTRIES	1a
JUDGMENTS OF THE COURTS BELOW	2a
COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF	3a
DEMURRER TO COMPLAINT	15a
RULING ON DEMURRER AND ORDER VACATING NOTICE OF INTENDED DECISION IN RE PRELIMINARY HEARING	16a

RELEVANT DOCKET ENTRIES IN THE PROCEEDING BELOW

Date	*Proceedings*
October 24, 1972	Complaint for Damages and Injunctive Relief filed
November 22, 1972	Defendants Demurrer to Complaint filed
February 14, 1973	Ruling on Demurrer and Order Vacating Notice of Intended Decision in Re Preliminary Injunction
April 30, 1973	Notice of Appeal filed by Plaintiffs from Order of February 14, 1973
July 26, 1974	Judgment of Court of Appeal, Second Appellate District, Division II
October 24, 1974	Petition for Rehearing Denied by California Supreme Court

JUDGMENTS OF THE COURTS BELOW

The Judgment of the Court of Appeal of the State of California Second Appellate District is set forth in the Appendix to the Petition for Certiorari filed January 17, 1975, at p. 1a.

The Order of The Supreme Court of California denying the petition for hearing is set forth in the Appendix to the Petition for Certiorari filed January 17, 1975, at p. 1b.

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FILED
SUPERIOR COURT
OCT 24 1972
D.E. Lewis, County Clerk
By Beverly Pedigo
Deputy Clerk

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SANTA BARBARA

LEONOR ALBERTI DE CANAS, and MIGUEL CANAS, Plaintiffs, vs. ANTHONY G. BICA, JUAN SILVA, DOES I through X, inclusive, Defendants.	No. SM 11789 COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

FIRST CAUSE OF ACTION

Plaintiffs allege:

1. This action is brought pursuant to California Labor Code § § 2805(a) and 2805(c). Section 2805(a) provides as follows:

> No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

Section 2805(c) provides:

> The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a).

2. Plaintiff LEONOR ALBERTI de CANAS is the wife of plaintiff MIGUEL CANAS. She is a resident of the City of Santa Maria, County of Santa Barbara, California. Plaintiff LEONOR ALBERTI de CANAS lawfully entered the United States from Honduras and was duly registered according to law as an immigrant on September 22, 1966. Her status as an immigrant is further defined as Class SA-1 which entitled her to work in many occupations including that of agricultural worker. Plaintiff LEONOR ALBERTI de CANAS has been employed for the past five (5) years as a field agricultural worker. Plaintiff LEONOR ALBERTI de CANAS is known among fellow employees and former employers as a conscientious and diligent worker.

3. Plaintiff MIGUEL CANAS lives with his wife and six (6) minor children in the City of Santa Maria, County of Santa Barbara. Plaintiff MIGUEL CANAS lawfully entered the United States from El Salvador and

was duly registered according to law as an immigrant on January 1, 1965. Plaintiff CANAS' status as an immigrant is further defined as Class 0-1 which entitled him to work in every occupation except those few reserved for citizens. Plaintiff MIGUEL CANAS has been employed for the past five (5) years as a field agricultural worker. Plaintiff CANAS is known among his fellow employees and former employers as a conscientious and diligent worker.

4. Defendant ANTHONY G. BICA is, *inter alia*, a farm labor contractor who knowingly employs illegal alien entrants into the United States as farm workers on his crews in place of qualified and lawfully resident local workers.

5. Defendant BICA at all times relevant herein did and does reside, and did and does maintain his principal place of business, in the City of Santa Maria, County of Santa Barbara, California.

6. Defendant JUAN SILVA is, *inter alia*, the manager and foreman of defendant BICA. Defendant SILVA employs illegal entrants as farm workers as crew members in place of qualified and lawfully resident local workers.

7. Plaintiffs are informed and believe and therefore allege that at all times mentioned herein Does I through X were grape growers who obtained employees to work in their grape vineyards through defendants BICA and SILVA; that through defendants BICA and SILVA defendants Does I through X are able to employ and do employ illegal entrants as farm workers in place of qualified legally resident local workers. The true names or capacities, whether individual, corporate, associate or otherwise, of the defendants Does I through X are

unknown to plaintiffs, who therefore sue said defendants by such fictitious names, and plaintiffs will amend this complaint to show their true names and capacities when the same have been ascertained. Does I through X and the named defendants where the agents and the employees of their co-defendants and in doing the things herein alleged were acting within the course and scope of such agency and employment at all times.

8. Plaintiffs MIGUEL CANAS and LEONOR ALBERTI de CANAS were offered employment as farm workers by defendants BICA and SILVA and accepted said offers of employment on or about June 5, 1972. In accepting such employment with defendants each plaintiff gave up previous farm labor employment with another employer based upon the representations made by defendants BICA and SILVA that employment with defendants would provide a good and steady job.

9. Each plaintiff herein worked for defendants BICA and SILVA from a time on or about June 5, 1972 until a time on or about September 28, 1972. On or about September 28, 1972 defendants denied plaintiffs further employment on the sole ground that defendants then had a sufficient supply of labor. During their employment with defendants each was a good and hard worker and defendants at no time suggested that they were unsatisfactory employees in any respect.

10. Defendants are open and notorious employers of illegal aliens and encourage illegal aliens to compete with local workers for jobs in order to depress local wages and working conditions.

11. Defendants' work crews have been raided by the United States Border Patrol of the Immigration and Naturalization Service on at least 4 different occasions

during the summer and fall of 1972; on each occasion defendants were found to be employing illegal aliens; and said illegal aliens were apprehended and removed to Mexico on each occasion. Plaintiffs are informed and believe and therefore allege that the United States Border Patrol has apprehended no fewer than 40 illegal aliens from the work crews of defendants during the past 6 months; that the following numbers of illegal aliens were apprehended by the United States Border Patrol from defendants' work crews on or about the following dates: On August 10, 1972, 15 illegal aliens were apprehended; on September 23, 1972, 7 illegal aliens were apprehended; on October 17, 1972, 8 illegal aliens were apprehended; and on October 23, 1974, 4 illegal aliens were apprehended.

12. Defendants' employment of illegal aliens at the times alleged herein was wilfull and with actual or constructive knowledge of the illegal alien status of said workers. Certain of the illegal aliens apprehended from defendants' work crews and returned to Mexico by the United States Border Patrol subsequently entered illegally into the United States and worked for defendants.

13. On or about October 15, 1972 plaintiff MIGUEL CANAS asked defendant JUAN SILVA for employment for himself and the other named plaintiff. Defendant SILVA refused jobs to any of the plaintiffs for the sole reason that he and defendant BICA had no more jobs available on their work crews.

14. On October 17, 1972 at approximately 12:30 P.M., the United States Border Patrol raided defendants' work crews and apprehended 8 illegal aliens from said crew; 3 additional members of the work crew who were

believed to be illegal aliens fled by vehicle and escaped the United States Border Patrol.

15. On October 17, 1972 at approximately 4:30 P.M. plaintiff MIGUEL CANAS spoke with defendant BICA, requesting jobs for himself and the other named plaintiff. Defendant BICA refused such request for the sole reason that he allegedly had no jobs available.

16. On October 20, 1972, plaintiff CANAS again requested from defendant BICA jobs for himself and his wife and again was refused solely on grounds that no jobs were available.

17. On October 23, 1972 at approximately 11:30 A.M. the United States Border Patrol again raided defendants' work crews and apprehended 4 illegal aliens from said crew.

18. Plaintiffs are informed and believe and thereon allege that defendants presently maintain a steady work crew of no fewer than 15 workers, at least 10 of whom are illegal aliens and that defendants know of such illegal alien status. Said illegal aliens presently employed by defendants, all Spanish-speaking males, are visibly recent arrivals from Mexico by virtue of their dress, habits and language, and seek employment from defendants under conditions which put defendants or other employers on notice that said aliens are not entitled to employment by reason of their illegal status.

19. Defendants can, by simple request for production of documents on or after employment, ascertain with reasonable certainty that such prospective employees are illegally present in this country and have no right to work for defendants, but defendants wilfully fail and refuse to do so.

20. Plaintiffs are informed and believe and therefore allege that defendants' employment of illegal aliens at

all times mentioned herein has had the effect of displacing farm workers legally resident in the United States inasmuch as the supply of qualified job applicants for farm work in the Santa Maria Valley area exceeds the employers' demand for farm workers.

21. Plaintiffs are informed and believe and therefore allege that during the times herein mentioned defendants wilfully or knowingly, directly or indirectly, induced the illegal entry into the United States of aliens in violation of the laws of the United States and California by offering employment without securing proof that such aliens are entitled to legal presence in the United States.

22. Plaintiffs are informed and believe and therefore allege that during the times mentioned herein defendants wilfully or knowingly, directly or indirectly, took certain measures and initiated certain acts to shield said illegal aliens from detection by the United States Border Patrol. Additionally, defendants refused to assist the United States Border Patrol authorities in apprehending those illegal aliens fleeing from defendants' work crews upon observing the approach of the United States Border Patrol on the occasions described herein.

23. Plaintiffs are informed and believe and therefore allege that the United States Border Patrol of the Immigration and Naturalization Service is presently doing everything within its capacity and its legal powers to apprehend illegal aliens employed by defendants and other employers in the area and to transport said aliens out of the country, but that defendants continue to employ illegal aliens at will.

24. As a direct and proximate result of defendants' wrongful acts, the plaintiffs have been damaged by loss

of their employment with defendants in the amount of $20.00 per day from the date of defendants' denial of employment to a time presently unascertainable, and plaintiffs pray for leave to amend this complaint at such time as such information becomes available to them. Plaintiff's damages up to the date of filing this action are in a sum of no less than $1,800.00.

25. Defendants' unfair and unlawful actions have caused and continue to cause serious, substantial, permanent and irreparable harm to the plaintiffs in that they have unfairly and unlawfully denied employment to Santa Maria Valley farm workers, compel farm worker families to be dependent unnecessarily on public assistance, and unfairly and unlawfully suppress their wages and working conditions.

26. Unless restrained by this Court, defendants threaten to employ illegal aliens in the future to the irreparable injury of plaintiffs and their families. Plaintiffs have no adequate remedy at law for said injuries in that defendants' conduct will constitute a continuing hardship, thereby depriving plaintiffs of the very necessities of life owing to their loss of income from wages.

SECOND CAUSE OF ACTION (Unfair Competition)

27. Plaintiffs refer to and incorporate by reference herein Paragraphs 1 through 26 inclusive of the First Cause of Action.

28. California Civil Code § 3369 permits any member of the general public to bring suit for injunctive relief and damages against any person who engages in any unfair or unlawful business practice.

29. The acts of defendants as herein alleged were and are designed and do in fact cause unfair competition to plaintiffs who are all underemployed or unemployed as the result of defendants' acts; defendants' acts further cause unfair competition to the general public and to every California agricultural employer who complies with applicable United States and California law in regard to hiring practices.

30. Defendants at all times herein alleged have fostered, encouraged, aided and abetted unlawful competition with domestic farm workers, including the plaintiffs by employing illegal aliens and thus creating unemployment and underemployment among lawfully residing domestic farm workers and thereby depressing wages and working conditions in the Santa Maria Valley.

31. Defendants through their agents, illegal alien employees, unfairly and unlawfully have competed with domestic farm workers including plaintiffs.

32. United States Immigration and Naturalization Service statistics during 1971 indicate that 420,000 illegal aliens, primarily Mexican citizens seeking farm labor employment, were apprehended by the United States Border Patrol. Federal labor authorities estimate that for every illegal alien who is apprehended, two enter the country and leave undetected. Thus, in any given year, over one million illegal aliens are employed primarily in the United States farm labor, or approximately 20 per cent of the primary agricultural work force. Moreover, the percentage of illegal aliens employed by any individual employer is directly related to the conditions of employment offered by that employer: the worse the working conditions, the greater the number of illegal aliens.

33. The employment of illegal alien labor by defendants and other employers creates an onerous economic effect upon the Santa Maria Valley area. Plaintiffs are informed and believe and therefore allege that during the past fiscal year approximately 200 local farm worker fathers were underemployed or unemployed and receiving consequent public assistance owing to the employment of an estimated minimum of 400 illegal aliens in the area at a minimum cost to local and state taxpayers in a sum in excess of $256,000.00.

34. Plaintiffs are informed and believe and therefore allege that local lawfully resident farm workers would have earned additional wages in a sum of not less than $800,000.00 during the last fiscal year through farm labor employment but for the wrongful acts of defendants and others in employing an estimated minimum of 400 illegal aliens at an average of an estimated minimum 4 months. Moreover, virtually all of the wages earned by illegal aliens while employed in this country are sent or taken outside the United States, primarily to Mexico, and spent there. The employment of illegal aliens by defendants and others in the Santa Maria Valley, therefore, results in the financial loss to local tax payers in excess of one million dollars annually by virtue of wages drained from the local area and welfare payments made to displaced lawfully residing local workers.

WHEREFORE, plaintiffs pray for the following relief:

1. For an order temporarily and permanently restraining the defendants, their representatives and employees and all persons acting in concert or participating with them from engaging in or performing, directly or indirectly, any and all of the following acts:

From failing or refusing to hire each plaintiff herein for regular employment unless defendants make a showing that all of defendants' available job positions are filled by employees who are citizens or lawful residents of the United States. Such showing shall consist of a declaration by either defendant attaching a copy of the evidence of citizenship or lawful residence of each such employee, to be filed in this Court within 24 hours from the time of service of this order upon either defendant herein.

2. For an order preliminarily and permanently enjoining the defendants, their officers, agents, employees and assigns,

(a) from employing in agriculture positions, with actual or constructive knowledge, directly or indirectly, any non-citizen not legally entitled to employment in the United States;

(b) from failing to obtain reasonable proof of a farm worker applicant's lawful residence status in the United States as a condition precedent to any employment as evidenced by documentation issued by the United States Immigration and Naturalization Services or other duly authorized federal agency; and

(c) from failing or refusing to make such documentation of an employee's lawful residence available to the United States Border Patrol authorities, plaintiffs or their attorneys for inspection upon reasonable notice.

3. For actual damages in the amount set forth in the complaint; and

4. For exemplary damages in the amount of $5,000.00 for each named plaintiff; and

5. For costs of suit, attorney's fees, and such other relief as the Court deems proper.

DATED: October 24, 1972.

/s/ Burton D. Fretz
BURTON D. FRETZ
Attorney for Plaintiffs

VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA BARBARA)

I am one of the Plaintiffs in the above entitled action; I have read the foregoing Complaint for Damages and Injunctive Relief and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief; and as to those matters I believe it to be true.

I, MIGUEL CANAS certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on October 24, 1972 at Santa Maria, California.

/s/ Miguel Canas
MIGUEL CANAS

[Certificate of service omitted in printing.]

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FILED
SUPERIOR COURT
NOV 22 1972
L.E. LEWIS, County Clerk
By S.R. LLAMAS
Deputy Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA BARBARA

-oOo-

LEONOR ALBERTI DE CANAS and MIGUEL CANAS, Plaintiffs, vs. ANTHONY G. BICA, JUAN SILVA, et al Defendants.	No. SM 11789 DEMURRER TO COMPLAINT

Comes now the Defendants, ANTHONY G. BICA and JUAN SILVA, and demur to Plaintiffs' Complaint herein as follows:

I

The First and Second Causes of Action of Plaintiffs' Complaint do not state facts sufficient to constitute a cause of action against Defendants.

II

The Court has no jurisdiction of the subject of the First Cause of Action alleged in Plaintiffs' Complaint.
DATED: November 22, 1972

Law Offices, DANIEL J. KIRK

By /s/ Robert Trapp, Jr.
Attorney for Defendants

[Certificate of service omitted in printing.]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA BARBARA

LEONOR CANAS, et al.,	)	No. SM 11789
	)	
Plaintiffs,	)	RULING ON DEMURRER
	)	AND ORDER VACATING
vs.	)	NOTICE OF INTENDED
	)	DECISION IN RE
ANTHONY G. BICA, et al.,	)	PRELIMINARY
	)	INJUNCTION
Defendants.	)	

The defendants have filed a demurrer to the Complaint on the ground that it does not state facts sufficient to constitute a cause of action.

Prior to the hearing on the demurrer, there was a hearing upon the plaintiffs' request for a preliminary injunction, and oral and documentary evidence was

introduced. After completion of the hearing (extending over several days), and after considering the points and authorities submitted by the respective parties, it was announced in open court that I intended to grant the preliminary injunction, and requested a form of preliminary injunction to be presented.

After reconsideration of the points and authorities submitted on both the demurrer, and the request for a preliminary injunction,

IT IS HEREBY ORDERED that:

(1) The Notice of Intended Decision is vacated and set aside, and the request for a preliminary injunction is hereby denied.

(2) The demurrer to the Complaint is sustained, without leave to amend, and the action is dismissed.

Counsel for defendants shall prepare and serve an order in accordance with the foregoing.

DATED February 14, 1973.

/s/ Marion A. Smith
Judge of the Superior Court

MEMORANDUM

Labor Code 2805

Under the authorities submitted, I feel compelled, reluctantly, to find that Labor Code 2805 is unconstitutional, on the ground that (1) It encroaches upon, and interferes with, a comprehensive regulatory scheme enacted by Congress in the exercise of its exclusive power over immigration, and (2) violates the equal

protection clause of the 14th Amendment to the U.S. Constitution, as set forth in the leading case of *Purdy & Fitzpatrick vs. California*, 71 Cal (2) 566. See also *Cobos vs. Mello-Dy Ranch*, 20 CA (3) 947; and Memorandum of Opinion in the case of *Dolores Canning Co., Inc. vs. George W. Milias, etc.*, Case No. 016-928, Los Angeles Superior Court, which latter case holds Labor Code 2805 to be unconstitutional under *Purdy*, and that as a criminal statute it is too vague and uncertain for enforcement. As pointed out in *Dolores*, the statute forbids hiring of an "alien who is not entitled to lawful residence in the United States," and under the U.S. Immigration laws, there are many such aliens who may work in the United States, under certain classifications, and Labor Code 2805 is in direct conflict with Federal Law.

Civil Code 3369

Civil Code 3369 provides that (1) "Neither specific or preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in case of a nuisance or unfair competition. (2) Any person performing or proposing to perform an act of unfair competition within this state may be enjoined in any court of competent jurisdiction. (3) As used in this section, unfair competition shall mean and include unlawful, unfair or fraudulent practice . . ."

In the case of *Diaz vs. Kay-Dix Ranch*, 9 CA (3) 588, the court documents in detail the plight of the migrant farm worker, and the adverse effect upon his life and working conditions resulting from the employment of

Mexican Nationals illegally entering this country and state. Nevertheless, the court upheld the action of the lower court in sustaining a demurrer without leave to amend, and dismissal of the action. The court there pointed the finger at the Federal Government as being respondible for this condition, and after considering the various factors, pro and con, as to the granting of an injunction, said, "A third factor, the comparative efficacy of federal action, tips the scales against the relief . . . It is more orderly, more effectual, less burdensome to the affected interests, that the national government redeem its commitment. Thus the court of equity withholds its aid." The court further mentions, but does not pass on the questions of encroachment upon immigration regulation exclusively reserved to the Federal Government; Federal preemption; violation of civil rights legislation.

In *Diaz vs. Kay-Dix Ranch*, an injunction was specifically requested under Civil Code 3369, and the common law right to pursue a lawful occupation, the same as plaintiff does in this case. In the case of *Barguis vs. Merchants Collection Assn.*, 7 Cal (3) 94, the Supreme Court hints that except for "considerations of federalism" the alleged hiring of illegal aliens could constitute an "unlawful . . . business practice under Section 3369." Whether or not the Supreme Court meant that relief could have been granted in *Diaz* under Section 3369, if the court so elected, or that "considerations of federalism" precluded it, is not clear.

Since it has been determined above that Labor Code 2805 is unconstitutional, it does not seem reasonable that the same exercise of power by the court under the guise of injunctive relief pursuant to CC 3369 is any

more immune to attack, and for that reason any injunction granted under CC 3369 would be unconstitutional as violating the 14th Amendment (equal protection) and encroaching into a field preempted by the Federal Government, under the authority of *Purdy & Fitzpatrick.*

Damages

As to the action for damages, the question is perhaps more difficult. Except for Labor Code 2805, there is no common law remedy under the facts of this case. See *Cobos vs. Mello-Dy Ranch*, 20 CA (3) 947, and *Larez vs. Aberti*, 23 CA (3) 217, at page 226.

Since Labor Code 2805 is held to be unconstitutional, it would seem that the action for damages based solely thereon, would also fall.

Also, see *Cobos vs. Mello-Dy Ranch* (Supra) at page 951, which indicates that the "problems of enforcement, so well pointed out in Diaz, exist at least in equal degree in the enforcement of the federal act by state court intervention through awarding of damages, both compensatory and punitive. . . "

Admittedly, *Larez* refers to Labor Code 2805 (passed after the lower court decision) as providing a remedy, but it does not pass upon the constitutionality of that statute.

Conclusion

I am fully cognizant of the adverse effect that the hiring of illegal aliens has upon the migrant farm

workers, and upon the tax payer through increased welfare costs. After hearing the evidence on the preliminary injunction, it is reasonably certain that plaintiffs could sustain the factual allegations of their complaint. The need for a remedy is clearly pointed out in *Diaz.* However, until the Supreme Court determines the question, I feel powerless to supply such remedy, and through the rulings today, the question can be expeditiously presented and determined.

/s/ Marion A. Smith
Judge of the Superior Court

Supreme Court, U. S.
FILED
MAR 25 1975

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 75-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS, *Petitioners,*

vs.

ANTHONY G. BICA and JUAN SILVA, *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Second Appellate District

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Subject Index

Page

Question presented 1

Statement of the case 1

Summary of argument 2

Argument 2

I.

State laws which attempt to regulate immigration are null and void under the doctrine of federal pre-emption 2

A. States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation 2

B. Even assuming that states could legislate in the field of immigration and naturalization absent federal legislation, the Immigration and Nationality Act of 1952, as amended in 1965, effectively precludes any state legislation 5

C. Section 2805 of the California Labor Code is unconstitutional because it encroaches on a particular aspect of immigration and naturalization upon which Congress has spoken 7

Conclusion 15

Table of Authorities Cited

Cases

	Pages
Chae Chan Ping v. U.S., 130 U.S. 581, 32 L.Ed. 1068 (1889)	3, 14
Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U.S. 596, 59 L.Ed. 1137 (1914)	7
Chy Lung v. Freeman, 92 U.S. 75, 23 L.Ed. 550 (1875)	3
Ekiu v. U.S., 142 U.S. 651, 35 L.Ed. 1146 (1892)	3
Goldstein v. California, 412 U.S. 546, 37 L.Ed.2d 163 (1973)	13
Graham v. Richardson, 403 U.S. 365, 29 L.Ed.2d 534 (1971)	4
Henderson v. Mayor of New York, 92 U.S. 259, 23 L.Ed. 543 (1875)	3, 7
Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581 (1940)	7, 8, 14
Kewanee Oil Company v. Bicron Corp., ___ U.S. ___, 40 L.Ed.2d 315 (1974)	13, 14
Pennsylvania v. Nelson, 350 U.S. 497, 100 L.Ed. 640 (1955)	5, 6, 7
The Passenger Cases (Smith v. Turner), 48 U.S. 283, 12 L.Ed. 702 (1849)	3
Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131 (1915)	4, 5
United States v. Evans, 333 U.S. 483, 92 L.Ed. 823 (1948)	10

Codes

Labor Code:	
Section 2805	1, 2, 4, 5, 7, 9, 13, 14, 15

Constitutions

United States Constitution:	
Article I, Section 8, clause 4	2
Article I, Section 8, clause 8	13

House Reports

	Pages
House Report 982, Section 2	11
Pages 3, 4, and 5	12
Judiciary Committee Report to House Report 982 (93-108, 93rd Congress, 1st Session):	
Page 5	13
Page 6	12
Pages 12, 13	12
Page 15	13

Statutes

Alien Registration Act of 1940	7, 8
Immigration Act of 1917	10
Immigration and Nationality Act of 1952:	
8 U.S.C. Sections 1101, et seq.	2, 5, 6, 10
8 U.S.C. Section 1101(a)(15)(H)(ii)	9, 11
8 U.S.C. Section 1182(a)(14)	9, 10, 11
8 U.S.C. Section 1324(a)	2, 5, 9, 10, 11, 14
Smith Act 1940, amended 1948	6

Texts

Gordon and Rosenfield, Immigration Law and Procedure, Vol. 1, pp. 1-27	3
U.S. Code, Cong. & Admin. News, 1952:	
Page 276	6
Page 1653	6
Page 1724	9
U.S. Code, Cong. Admin. News, 1955, Section 18:	
Page 3344	18
U.S. Code, Cong. & Admin. News, 1965:	
Pages 3333, 3334, and 3329	10

Index to Appendix

	Pages
1. Section 2805, California Labor Code	i
2. 8 USC 1182(a) [1952]	i
3. 8 USC 1182(a) [1965]	ii
4. 8 USC 1324(a)	ii
(3)	ii
(4)	ii-iii
5. H.R. 982, Sec. 2	iii

In the Supreme Court
OF THE
United States

October Term, 1974

No. 75-882

Leonor Alberti De Canas and
Miguel Canas, *Petitioners,*

vs.

Anthony G. Bica and Juan Silva, *Respondents.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
to the Court of Appeal of the State of California
Second Appellate District

QUESTION PRESENTED

Is Section 2805 of the California Labor Code an unconstitutional attempt to encroach upon the Federal scheme of immigration?

STATEMENT OF THE CASE

Petitioner sought injunctive relief and damages pursuant to Section 2805, California Labor Code.

A demurrer without leave to amend was sustained on February 14, 1973. The Court of Appeals, Second Appellate District, State of California, affirmed on July 26, 1973. Petition for hearing by the California Supreme Court was denied on October 24, 1974.

SUMMARY OF ARGUMENT

States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation. Immigration is a field which is reserved to the Federal government. The Federal government has completely occupied this field by passage of the Immigration and Nationality Act of 1952, as amended in 1965. Section 2805 of the California Labor Code is in direct conflict with 8 USC §1324(a), Immigration and Nationality Act of 1952, as amended in 1965.

ARGUMENT

I.

STATE LAWS WHICH ATTEMPT TO REGULATE IMMIGRATION ARE NULL AND VOID UNDER THE DOCTRINE OF FEDERAL PRE-EMPTION.

A. States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation.

The United States Constitution provides, in Article I, Section 8, clause 4:

> "The Congress shall have the Power . . . to establish a uniform rule of Naturalization . . ."

This power is exclusive.

There is no direct mandate in the United States Constitution dealing with the power to regulate immigration. The federal government did not adopt immigration restrictions for its first 100 years. However, whenever states attempted to control immigration, their attempts were struck down under the theory that the regulation of immigration concerned foreign commerce and this was an area exclusively that of the federal government. *The Passenger Cases (Smith v. Turner)* 48 U.S. 283, 12 L.Ed. 702 (1849); *Henderson v. Mayor of New York,* 92 U.S. 259, 23 L.Ed. 543 (1875); *Chy Lung v. Freeman,* 92 U.S. 75, 23 L.Ed. 550 (1875); Gordon and Rosenfield, Immigration Law and Procedure, Vol. 1, pages 1-27.

In subsequent decisions this Court enlarged the scope of federal power in this area, and stated that the power to regulate immigration was implied from two sources. The first source of implied power is from the specific directives in the Constitution to regulate foreign commerce, declare war, make treaties, establish a uniform rule of Naturalization, prohibit the importation of persons, and to make all necessary and proper laws. The second source of implied powers to regulate immigration is as an incident of national sovereignty without any specific grant in the Constitution. *Chae Chan Ping v. U.S.,* 130 U.S. 581, 32 L.Ed. 1068 (1889); *Ekiu v. U.S.,* 142 U.S. 651, 35 L.Ed. 1146 (1892). In *Ekiu v. U.S.,* the Court stated at page 659:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent sovereignty, and essential to self preserva-

tion to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

Section 2805 of the California Labor Code,[1] if allowed to stand, will regulate immigration. If enforced, it will result in the massive shifts of "aliens not entitled to lawful residence" across the international border with Mexico or the state borders of Oregon, Nevada, and Arizona.[2]

This is undoubtedly the purpose of the statute. However laudible that purpose may be, it is a regulation of immigration and not permitted. This Court, in *Truax v. Raich,* 239 U.S. 33, 60 L.Ed. 131 (1915) held that an Arizona law, which effectively deterred interstate migration of aliens by imposing a substantial limitation on employment opportunities interfered with the power of the federal government to

[1]Section 2805 of the California Labor Code reads as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

[2]It is also possible that those who will be terminated from employment would go on the general welfare rolls. The decision of *Graham v. Richardson,* 403 U.S. 365, 29 L.Ed.2d 534 (1971), invalidated state rules either denying aliens general assistance or imposing residence requirements on aliens. It is unclear whether states can deny assistance to aliens not entitled to lawful residence.

admit persons to this country under acts of Congress. At page 42, 239 U.S., the Court states:

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."

Labor Code Section 2805 likewise seeks to control immigration into the State of California and the migration of aliens interstate by seeking to abolish their employment opportunities.[3]

B. Even assuming that states could legislate in the field of immigration and naturalization absent federal legislation, the Immigration and Nationality Act of 1952, as amended in 1965, effectively precludes any state legislation.

Pennsylvania v. Nelson, 350 U.S. 497, 100 L.Ed. 640 (1955), declared the test to be used to determine whether the federal government has so occupied a field that a state cannot legislate in that area.

"First, the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to supplant it." Page 502.

"Second, the federal statutes touch a field in which the federal interest is so dominant that the

[3]Petitioners may contend that the situation is unlike *Truax v. Raich* because Section 2805 only deals with aliens not entitled to lawful residence while *Truax* applied to aliens otherwise lawfully admitted into the United States. Analytically this is incorrect, because there may be some time, either at the present or in the future, when employment of aliens not entitled to lawful residence would not have an adverse effect on lawful resident workers. If that situation arose, then it would not be a violation of Section 2805 to hire an alien not entitled to lawful residence and California would actually be encouraging the entry of aliens not entitled to lawful residence. This again amounts to an attempt to control immigration.

federal system must be assumed to preclude enforcement of state laws on the same subject." Page 504.

"Third, enforcement of State Sedition Act presents a serious danger of conflict with the administration of the federal program." Page 505.

In *Pennsylvania v. Nelson,* supra, the State of Pennsylvania had enacted the Pennsylvania Sedition Act. This Court held that the federal government, by enacting the Smith Act in 1940, and amending it in 1948, invalidated the state law under the doctrine of federal suppression.

It must be conceded that Congress has enacted a comprehensive scheme for immigration and nationality. The Immigration and Nationality Act of 1952 is found at 8 USC § 1101 et seq. It was passed over President Truman's veto on January 27, 1952. U.S. Code, Cong. & Admin. News, 1952, page 276. The volume and subject matter alone indicate the comprehensiveness of the Act. Congress thought that it was enacting a comprehensive law as the committee states at page 1653 U.S. Code, Cong. & Admin. News, 1952:

"Purpose of the Bill

The purpose of the bill is to enact a comprehensive, revised immigration, naturalization and nationality code."

By virtue of the comprehensive legislation in this area, the State of California is precluded from also legislating. Clearly the tests of *Nelson* are met, and Section 2805 must fall. First, the scheme of federal

regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Second, as was shown previously in Part A of this brief, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of same laws on the same subject. Third, the enforcement of the state act presents a serious danger of conflict with the administration of the federal program as it could drive masses of people to other states. As Justice Holmes said in *Charleston & W. C. R. Co. v. Varnville Furniture Co.,* 237 U.S. 596, 59 L.Ed. 1137 (1914):

"When Congress has taken a particular subject matter in hand, coincidence is as ineffective as opposition, and the state law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

C. Section 2805 of the California Labor Code is unconstitutional because it encroaches on a particular aspect of immigration and naturalization upon which Congress has spoken.

Section 2805 should fall because it is an attempt to regulate immigration, *Henderson v. Mayor of New York,* supra, and because Congress has completely occupied the field of immigration, *Pennsylvania v. Nelson,* supra.

It must also fall under the theory of *Hines v. Davidowitz,* 312 U.S. 52, 85 L.Ed. 581 (1940). In *Hines,* supra, the State of Pennsylvania passed an alien registration law which required all aliens to register and carry alien identification cards. The federal government, in 1940, passed the Alien Registra-

tion Act. Davidowitz, an alien, filed an action to declare the Pennsylvania Act unconstitutional. He advanced two theories, summarized at 312 U.S. 59, 85 L.Ed. 582. First, the Pennsylvania Act encroached on a field reserved for the federal government. Second, it was a denial of equal protection. Justice Black, writing for the majority, restricted the ruling to: "Whether, by adoption of a comprehensive, integrated scheme for regulation of aliens, Congress has precluded state action." This was resolved in favor of Davidowitz, *Hines v. Davidowitz,* supra, page 62 and 63:

> "That the supremacy of national power in the general field of foreign affairs, including power of immigration, naturalization, and deportation, is made clear by the Constitution, was pointed out by the authors of the Federalist in 1787 (fn omitted). When the national government, by treaty or statute has established rules and regulations touching the rights, privileges, obligations, or burdens of aliens as such, the treaty or the statute is the supreme law of the land. No state can add to or take from the force in effect of such treaty or statute. . . ."

The opinion continues, at page 66 and 67:

> "And where the Federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations (fn omitted)."

All that need be added to the present case is the substitution in the above statement of the word "employment" for the word "registration."

Petitioner maintains that Section 2805 is consistent with the Federal scheme of immigration. As such, Petitioner states that Section 2805 reinforces the policy expressed in 8 USC § 1182(a)(14), (applicants for permanent admission), and 8 USC § 1101(a)(15)(H)(ii) (issuing of labor certificates to temporary workers who are non-immigrants and perform labor if unemployed workers in this country cannot be found).

It is obvious, however, that Section 2805 has nothing to do with either temporary employment of non-immigrants without visas or permanent admission of immigrants. It is directed solely at employers of "aliens not entitled to lawful residence." This area has also been specifically dealt with by Congress in 8 USC § 1324(a) which provides a comprehensive scheme for defining the crimes of transporting or harboring, or inducing entry of any alien not lawfully entitled to enter or reside within the United States. The statute itself emphasized that employment was not a violation of the Act. *"Provided, however,* etc." The legislative history is not silent on this matter either. U.S. Code, Cong. & Admin. News, 1952, page 1724:

> "The committee wishes to state that employment (including the usual and normal practice incident to employment) shall not be deemed to constitute harboring, and, with this reservation, the committee strongly recommends the enactment of Section 274 [1324(a)] as amended."

Section 1324(a) was the subject of concern when the Immigration and Nationality Act of 1952 was under consideration. This was necessitated by the decision in *United States v. Evans,* 333 U.S. 483, 92 L.Ed. 823 (1948) which held that the penalty provisions under the Immigration Act of 1917 were inadequate to provide a penalty for concealing or harboring aliens unlawfully in the United States. Section 1324 (a) was rewritten so that concealing or harboring were violations of the Act. It is thus clear that Congress addressed itself squarely on the issue of employment of aliens not entitled to lawful residence and declared that it was not unlawful.

Petitioner places much reliance on the amendments to the Act which were made in 1965. However, those amendments address themselves to the issuing of visas to aliens seeking employment. 8 USC § 1182(a)(14) was amended to put the burden on the alien to establish that there were not sufficient workers in the United States at the alien's destination who are able, willing and qualified to perform the skilled or unskilled labor and that his employment would not adversely affect wages and working conditions of U.S. citizens similarly employed. U.S. Code, Cong. & Admin. News, 1965, pages 3333 and 3334. At page 3329 the Committee's report, Item No. 7 states:

> "7. Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market are strengthened."

This, of course, has nothing to do with employment of aliens not entitled to lawful residence. Had the petitioner charged that the Secretary of State was issuing visas contrary to the provisions of 8 USC § 1182 (a)(14) or labor certificates pursuant to § 1101(a) (15)(H)(ii) then he could seek relief in Federal District Court.

Petitioner would have the Court believe that by amending 8 USC § 1182(a)(14), Congress was inviting the individual states to pass laws which would restrict the employment of aliens not entitled to lawful residence in the United States. There is a major problem with such a theory. Congress would have had to address itself to the penalty provision chapter of the Immigration Title of the Act rather than the admission qualifications chapter. It then would have had to delete the employment exemption and/or create a new crime, namely that of employing aliens not entitled to lawful residence. It did neither of these. It did examine the penalty provision chapter and amended 1322(a) to bring it into conformity with § 1182(a)(14). U.S. Code, Cong. & Admin. News, 1955, page 3344 (Section 18).

Congress is not ignorant of the problem of employment of aliens not entitled to lawful residence. On May 3, 1973, the House of Representatives passed H.R. 982.[4] The section of concern for this case of H.R. 982 is Section 2. The bill amends 8 USC § 1324 (a) to provide a penalty for knowingly employing any alien not lawfully admitted to the United States for permanent residence. It involves a three-step proce-

[4]H.R. 982 has been reintroduced in this session of Congress again as H.R. 982.

dure in which an employer is first cited, then fined civilly, and finally charged with a misdemeanor on the third offense. (H.R. 982, pages 3, 4 and 5).

Some relevant portions of the committee (judiciary) report (93-108 to accompany H.R. 982, 93rd Congress, 1st Session) include:

> "Since under present law there is no prohibition on the employment of illegal aliens . . ." page 6.

> "The original legislation before the Committee (H.R. 2328, 92nd Congress, which was introduced at the request of the administration), would have provided a $1,000 fine and/or one year imprisonment for a first violation. The Committee reviewed this approach as too severe, and recognized the possibility of employment discrimination if criminal penalties were initially imposed. Consequently the Committee rejected this approach and instead, substituted the graduated three-step procedure for the imposition of sanctions." Pages 12 and 13.

"Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appeared to be condoned by the existing proviso in Section 274(a)(4) [1324 (a)(4)] that employment shall not be deemed to constitute the harboring of illegal aliens." Page 15.

"Moreover, despite the fact that eight out of ten illegal aliens apprehended are Mexican natives, the problem is no longer restricted to the agricultural and border area of the Southwestern United States. Increasing, illegal aliens travel,

> or arrange to be transported, to all of the metropolitan areas in the United States, where they can obtain higher-paying jobs in industry and, at the same time, more easily escape detection by Immigration authorities." Page 5.

It is clear that Congress has carefully considered the problem of employment of aliens not entitled to lawful residence. It is also clear that Congress has made the express determination that such employment is not unlawful. It may decide to alter this position in the future, but that is a matter strictly within its jurisdiction, and not that of the individual States. Section 2805 of the Labor Code is not an aid to the federal scheme, but is in direct conflict with it and is invalid.

Petitioners' reliance on *Kewanee Oil Company v. Bicron Corp.*, ... U.S. ....., 40 L.Ed.2d 315 (1974) is not well placed. The Court in *Kewanee,* supra, held that:

> ". . . just as the States may exercise regulatory power over writings so may the States regulate with respect to discoveries." Page 324.

This was based on *Goldstein v. California,* 412 U.S. 546, 37 L.Ed.2d 163 (1973) which held that the clause 8 (Article I, § 8), grant of power to Congress to protect intellectual property was not exclusive in that, at least in the case of writings, the States were not forbidden from encouraging and protecting efforts of those within their borders by appropriate legislation.

Immigration and foreign affairs can hardly be classified as intellectual property. Respondent has shown that immigration is not a subject of concurrent jurisdiction, but is exclusive. Respondent has also shown that the federal government has completely occupied this field. Respondent has also shown that the underlying policy of § 2805 "clashes with the objectives" of 8 USC § 1324 (a). The objective of § 1324 (a) is to exempt employers from criminal liability for employing aliens not entitled to lawful residence. The objective of Section 2805 is to attach civil and criminal liability for employing aliens not entitled to lawful residence.

Kewanee, supra, is also inapplicable to this case because the very foundation of *Kewanee* is:

> ". . . the great diversity of interests in our Nation—the essentially non-uniform character of the appreciation of intellectual achievements in the various States." Page 324.

If there is one subject which does not lend itself to diverse treatment by the various States, it is that of immigration and foreign affairs. *Hines v. Davidowitz,* supra; *Chae Chan Ping v. U.S.,* supra, at page 606:

> "For local interests, the several States of the Union exists; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

CONCLUSION

In summary, it is respondents' contention that Section 2805 of the California Labor Code is unconstitutional under three separate and distinct theories of federal pre-emption.

First, it attempts to regulate immigration and is unconstitutional because that is a subject matter over which the federal government has exclusive jurisdiction. Under this theory, even if Congress had not legislated, Section 2805 would be unconstitutional.

Second, assuming arguendo, that the States had concurrent jurisdiction over immigration and nationality, Section 2805 is unconstitutional because Congress has enacted a comprehensive scheme and left no room for the individual States to legislate.

Third, Congress has addressed itself to the specific area that Section 2805 does, namely penalties for the employment of aliens not entitled to lawful residence. It has expressly stated that such employment is not unlawful. Section 2805 is in direct conflict with this policy and is invalid.

Respectfully submitted,
ROBERT L. TRAPP, JR.,
WILLIAM S. MARRS,
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Attorneys for Respondents.

March 21, 1975.

(Appendix Follows)

APPENDIX

Appendix

1. Section 2805 of the California Labor Code reads as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

---

2. 8 U.S.C. 1182(a)(14) provided (1952-1965) for the exclusion of admission the following class of aliens: "Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which alien is destined) to perform such skilled or unskilled labor or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed."

3. 8 USC 1182(a)(14) provides (1965-present) for the exclusion of admission the following class of aliens: "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . ."

---

4. 8 USC 1324 "(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this act or any other law relating to the im-

migration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

---

5. H.R. 982. Sec. 2. Section 274 of the Immigration and Nationality Act (8 USC 1324) is amended by deleting the proviso in paragraph 4 of subsection (a) and by redesignating subsection (b) as subsection (c) and adding new subsections (b), (c), and (d) to read as follows:

"(b)(1) It shall be unlawful for any employer or any person acting as an agent for such an employer, or any person who for a fee, refers an alien for employment by such an employer, knowingly to employ, continue to employ, or refer for employment any alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General: *Provided,* That an employer, referrer, or agent shall not be deemed to have violated this subsection if he has made a bona fide inquiry whether a person hereafter employed or referred by him is a citizen or an alien, and if an alien, whether he is lawfully admitted to the United States for permanent residence or is authorized by the At-

torney General to accept employment: *Provided further,* That evidence establishing that the employer, referrer, or agent has obtained from the person employed or referred by him a signed statement in writing in conformity with regulations which shall be prescribed by the Attorney General that such person is a citizen of the United States or that such person is an alien lawfully admitted for permanent residence or is an alien authorized by the Attorney General to accept employment, shall be deemed prima facie proof that such employer, agent or referrer has made a bona fide inquiry as provided in this paragraph. The Attorney General of the United States shall prepare forms for the use of employers, agents, and referrers in obtaining such written statements and shall furnish such forms to employers, agents, and referrers upon request.

"(2) If, on evidence or information he deems persuasive, the Attorney General concludes that an employer, agent, or referrer has violated the provisions of paragraph (1), the Attorney General shall serve a citation on the employer, agent, or referrer informing him of such apparent violation.

"(3) If, in a proceeding initiated within two years after the service of such citation, the Attorney General finds that any employer, agent, or referrer upon whom such citation has been served has thereafter violated the provisions of paragraph (1), the Attorney General shall assess a penalty of not more than $500 for each alien in respect to whom any violation of paragraph (1) is found to have occurred.

"(4) A civil penalty shall be assessed by the Attorney General only after the person charged with a violation under paragraph (3) has been given an opportunity for a hearing and the Attorney General has determined that a violation did occur, and the amount of the penalty which is warranted. The hearing shall be of record and conducted before an immigration officer designated by the Attorney General, individually or by regulation and the proceedings shall be conducted in accordance with the requirements of title 5, section 554 of the United States Code.

"(5) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Attorney General shall file a suit to collect the amount in any appropriate district court of the United States. In any such suit or in any other suit seeking to review the Attorney General's determination, the suit shall be determined solely upon the administrative record upon which the civil penalty was assessed and the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

"(c) Any employer or person who has been assessed a civil penalty under subsection (b)(3) which has become final and thereafter violates subsection (b)(1) shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, for each alien in respect to whom any violation of this subsection occurs."

Supreme Court, U. S.
FILED
JUN 6 1975
MICHAEL RODAK, JR., CLERK

No. 74-882

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEONOR ALBERTI DE CANAS AND MIGUEL CANAS, PETITIONERS

v.

ANTHONY G. BICA AND JUAN SILVA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DIVISION

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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LEONOR ALBERTI DE CANAS AND MIGUEL CANAS, PETITIONERS

v.

ANTHONY G. BICA AND JUAN SILVA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DIVISION

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum as *amicus curiae* is submitted in response to the invitation of the Court dated April 14, 1975.

STATEMENT

Petitioners, who are farmworkers, instituted this suit pursuant to California Labor Code §2805,[1] alleging that respondents had refused them continued employment due to a surplus of labor resulting from respondents' knowing employment of aliens not legally admitted to

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[1]California Labor Code §2805 (West, Cum. Supp. 1975) provides (Pet. App. C, p. 1c):

> (a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers. (b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200) nor more than five hundred dollars ($500) for each offense. (c) The foregoing provision shall not be a bar to civil action against the employer based upon violation of subdivision (a).

the United States for permanent residence (Pet. 4).[2] Petitioners sought reinstatement and a permanent injunction against respondents' willful employment of illegal aliens.

The trial court, on February 14, 1973, declared California Labor Code §2805 unconstitutional on the ground that it had been preempted by federal immigration law, and dismissed the complaint (Pet. 4).[3] The California Court of Appeal, Second Appellate Division, affirmed (Pet. App. A), and the Supreme Court of California denied petitioners' request for a hearing (Pet. App. B).

ARGUMENT

The decision below is correct and review by this Court is not warranted.

The California law regulates the employment of all aliens in the state: it prohibits the employment of aliens illegally in the state (Cal. Labor Code §2805, *supra*, n. 1) and it requires other aliens to produce proof of lawful residence as a condition of employment (Cal. Administrative Code, Title 8, part 1, c. 8, Art. 1, §16209.4; Pet App. C, pp. 2c-3c). As such, it touches on "[o]ne of the most important and delicate of all international relationships," the recognized obligation of governments to protect "the just rights of a country's own nationals when those nationals are in another country." *Hines* v. *Davidowitz*, 312 U.S. 52, 64. "Consequently," as the Court said in *Hines* (*id.* at 66), "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where

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[2]Petitioners based their complaint upon California Civil Code §3369 (West, Cum. Supp. 1975), which in part authorizes injunctive relief to enforce a criminal statute prohibiting unfair competition (Pet. App. A, p. 2a).

[3]The statute was also declared unconstitutional in *Dolores Canning Co., Inc., et al.* v. *Robert E. Howard, et al.*, 115 Cal. Rptr. 435, 40 Cal. App. 3d 673 (Pet. App. A, p. 6a).

it acts, and the state also acts on the same subject, 'the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it' " (citing *Gibbons* v. *Ogden*, 9 Wheat. 1, 211).

The test to be applied in determining whether a state's law regulating aliens can survive in the face of federal legislation on the same subject was stated in *Hines, supra*, 312 U.S. at 67, 68 (footnote omitted), as follows:

> * * *[W]hether, under the circumstances of this particular case, [the state's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. And in that determination, it is of importance that this legislation is in a field which affects international relations, the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority. Any concurrent state power that may exist is restricted to the narrowest of limits * * *.

The approach of *Hines* was described in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, as follows:

> * * *[T]he Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

There is, accordingly, very little room, if any, for state regulation of aliens. In our view the California law, as here applied, is invalid because it intrudes upon a field where Congress has comprehensively defined the consequence of hiring illegal aliens as farmworkers.

The comprehensive federal policy is enunciated in the Farm Labor Contractor Registration Act of 1963, 78 Stat. 920, 7 U.S.C. 2041, *et seq.*, as amended by the Farm Labor Contractor Registration Act Amendments of 1974, Pub. L. 93-518, 88 Stat. 1652, *et seq.*, which defines the consequences of hiring illegal aliens.[4] In enacting the 1974 amendments, Congress indicated its awareness of the growing problem of employment of illegal aliens (S. Rep. No. 93-1295, 93d Cong., 2d Sess. 4 (1974)):

> * * *[I]llegal aliens have become an increasingly large source of farm labor in this country, and * * * the services of a contractor are often utilized to procure this clandestine workforce. Although the existing Act generally prohibits such activities by making it grounds for revoking or suspending the contractor's registration, such sanction in itself is ineffective since the majority of contractors have in the past ignored the Act's registration requirement. Thus, if this tide of illegal immigration is to be stemmed, stricter enforcement and stronger penalties must be applied against those who violate the Act. These additional steps are necessary in light of the adverse effect such importation of illegal aliens has had on the wages and job security of native Americans and lawfully admitted aliens, especially in times of high unemployment.

Accordingly, in those Amendments Congress (1) required farm labor contractors to "refrain from recruiting, employing, or utilizing, with knowledge, the services of any person, who is an alien not lawfully admitted

[4]While that Act contemplates some limited room for state law, the state law must be "appropriate." 7 U.S.C. 2051. As we show below, California Labor Code §2805 is not wholly in accord with federal policy, and thus is not appropriate.

for permanent residence or who had not been authorized by the Attorney General to accept employment," Sec. 11(a), 88 Stat. 1655; (2) extended the Farm Labor Contractor Registration Act to encompass (with certain limitations) contractors engaged in intrastate recruitment of farm workers, Sec. 2, 88 Stat. 1652-1653; (3) imposed additional farmworker-protection obligations on farm labor contractors, Sec. 10, 88 Stat. 1655; and (4) buttressed the enforcement mechanism of the 1963 Act by providing for civil money penalties, criminal penalties and private damage actions, Sec. 13, 88 Stat. 1656-1657. Indeed, petitioners concede (Pet. 13) that they could now assert the same cause of action and seek the same relief under the Farm Labor Contractor Registration Act Amendments of 1974 as they had asserted under the California law. Thus, federal law occupies the same field as the state law.

Section 2805 of the California Labor Code also conflicts with federal law, because the state law extends its criminal provisions generally to employers who knowingly employ an alien who is not entitled to lawful residence. Congress deliberately refrained from imposing criminal consequences upon the employment of illegal aliens in 8 U.S.C. 1324(a), which specifically provides that employment of an illegal alien shall not be deemed to constitute the crime of harboring an alien.

Moreover, Congress' recent consideration of legislation making it a crime to employ illegal aliens shows that the issue is a national one requiring a sensitive balancing of interests. When the proposal was first considered some Congressmen expressed the fear that the imposition of criminal penalties upon employers for the employment of illegal aliens would lead to a refusal by employers to hire any aliens in order to avoid any possibility of running afoul of the law. *E.g.*, 118 Cong. Rec. 30183

(1972) (remarks of Congressman Roybal). The House nevertheless passed the legislation. In the Senate, the bill was referred to the Judiciary Committee (118 Cong. Rec. 30445 (1972)), but no further action was taken.

To meet the fears that employers might refuse to hire all aliens, the bill was modified principally by providing for a graded series of penalties, beginning with a warning. See 119 Cong. Rec. 14181-14182, 14194 (1973). The House passed the legislation a second time. 119 Cong. Rec. 14208-14209 (1973). Again, in the Senate, the bill was referred to Committee (119 Cong. Rec. 14422 (1973)), but no further action was taken. The bill has been reintroduced in the present Congress as H.R. 982 (94th Cong., 1st Sess.).

The California law implicates problems of preeminent national concern. Congress has adopted the registration of farm labor contractors as the appropriate mechanism for control of the problem of employment of illegal aliens. It has specifically concluded that employment of illegal aliens does not constitute the crime of harboring. In considering legislation making the employment of aliens a crime, it has indicated that the problem is a national one which requires a more delicate balancing of interests than that achieved by the California law.

The California Court of Appeal correctly held that California Labor Code §2805 is invalid as applied in this case because the subject matter has been preempted by federal legislation. The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

IN THE

Supreme Court of the United States

No. 74-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS,

Petitioners,

v.

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Respondents.

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SECOND APPELLATE DISTRICT

PETITIONERS' RESPONSE TO MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The Solicitor General of the United States, in response to an invitation from this Court on April 14, 1975, submitted a memorandum for the United States as amicus curiae in this cause on June 6, 1975. That memorandum misreads the doctrine of preemption; it neglects a statutory provision, Title 7 U.S.C. § 2051, as amended 1974, and omits a leading decision of this Court.

First, the Solicitor General represents that the Farm Labor Contractor Registration Act, Title 7 U.S.C. § 2041 *et seq.*, by prohibiting the knowing employment of illegal aliens, preempts California Labor Code § 2805, which also prohibits the knowing employment of illegal aliens. This cause of action, of course, arose prior to the enactment of the federal amendments to which amicus refers. Moreover, the federal Act explicitly recognizes the validity of related state laws:

> This Chapter and the provisions contained herein *are intended to supplement State action* and compliance with this Chapter shall not excuse anyone from compliance with appropriate State law and regulation. 7 U.S.C. § 2051 (1964, as amended, 1974) (emphasis added).

The Solicitor General's designation of California Labor Code § 2805 as not an "appropriate" state law (Amicus Curiae memorandum, p.4.n.4.) is curious in view of the Solicitor General's apparent concession that the federal and state laws achieve identical objectives. Petitioners respectfully submit that the Solicitor General mistakenly rests his amicus brief on the proposition that harmony means preemption, and is further reason for clarification of the preemption doctrine by this Court. A narrow federal law normally does *not* invalidate a broader state law having the same effect, *Kewanee Oil Co., supra.* Just as federal safety rules governing interstate commerce do not preclude a state from passing local traffic laws having an impact on interstate commerce, *South Carolina State Highway Dept. v. Barnwell Brothers,* 303 U.S. 177 (1938), a law governing agricultural employment by interstate labor contractors does not preclude a state from regulating

employment in the same fashion where, as here, the state does not alter federal immigration law.

The Solicitor General points to H.R. 982 (the "Rodino Bill") which would impose federal penalties on the private employment of illegal aliens. No authority is cited, nor is any known, that mere congressional consideration of legislation evidences an intent to preempt the field from state regulation. Moreover, the future enactment of H.R. 982 would harmonize with California Labor Code § 2805. The reasoning of *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), would save the state law in such an instance. Although seemingly dispositive here, that decision is not mentioned in the brief of amicus curiae.

In closing, the petitioner urges the Court to grant its petition for writ of certiorari. The Solicitor General admits that California Labor Code § 2805 implicates problems of preeminent national concern. In the alternative, petitioners suggest that the lower court's order be vacated and the case be remanded for consideration of the recent amendments to the Farm Labor Contractor Registration Act and its effect on the state statute.

Respectfully submitted,

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HOWARD S. SCHER
Attorneys for Petitioners

Dated: June 11, 1975

Supreme Court, U. S.
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TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS OF LAW PRESENTED 2

STATEMENT OF THE CASE 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4

INTRODUCTION 5

I. BACKGROUND LEADING TO THE ENACTMENT OF CALIFORNIA LABOR CODE § 2805 5

II. GENERAL BACKGROUND OF THE SOCIAL AND ECONOMIC IMPACT OF ILLEGAL ALIENS ON THE UNITED STATES AND CALIFORNIA 8

A. The United States 8

B. California 13

SUMMARY OF ARGUMENT 16

ARGUMENT 18

I. CALIFORNIA LABOR CODE §2805, ENACTED TO PROTECT CALIFORNIA CITIZENS AND LAWFULLY RESIDENT WORKERS FROM UNEMPLOYMENT CAUSED BY COMPETITION FROM ILLEGAL ALIENS, IS A LEGITIMATE EXERCISE OF CALIFORNIA'S POLICE POWERS 18

A. The Parameters of the Preemption Doctrine 18

1. Occupation 19

2. Conflict 21

3. Recent Preemption Decisions of this Court 23

Page

B. Congress Has Not Occupied The Field So As To Preempt Labor Code §2805 26

C. Labor Code §2805 Furthers The Accomplishment of §274(a)(3) And Other Relevant Federal Law 29

CONCLUSION 34

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

California v. Zook, 336 U.S. 725 (1949) 20, 28

Carey v. South Dakota, 250 U.S. 118 (1919) 21

City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) 21, 22

Clark v. Allen, 331 U.S. 503 (1947) 34

Cobos v. Mello-dy Ranch, 20 Cal.App. 3d 947 (1971) 6

Diaz v. Kay-Dix Ranch, 9 Cal.App. 3d 588 (1970) 5, 6

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 16, 17, 19, 20, 22, 26

Goldstein v. California, 412 U.S. 546 (1973) 16, 20, 21, 24, 26, 28

Graham v. Richardson, 403 U.S. 365 (1971) 26, 27

Herrera v. United States, 208 F.2d 215 (9th Cir. 1953), *cert. denied*, 347 U.S. 927 (1954) 29

Hines v. Davidowitz, 312 U.S. 52 (1941) 20, 22, 27

Karnuth v. U.S., 279 U.S. 231 (1929) 17, 30

Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974) 24, 25, 26

Larez v. Oberti, 23 Cal.App. 3d 217 (1972) 6

Marin v. Smith, 376 F.Supp. 608 (D. Conn. 1974) 7

Maurer v. Hamilton, 309 U.S. 598 (1940) 21

Page

Merrill Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973) 17, 22, 24, 25, 33

Mintz v. Baldwin, 289 U.S. 346 (1933) 21

New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 19, 20, 22

Nowzewski Polish Style Meat Producers, Inc. v. Meskill, 376 F.Supp. 610 (D.Conn. 1974) 7, 8

R d v. Colorado, 187 U.S. 137 (1902) 21

Retail Clerk's Int. Assn. v. Schermerhorn, 375 U.S. 96 (1963) 21

Savage v. Jones, 225 U.S. 501 (1912) 21

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 22, 25

Susnjar v. United States, 27 F.2d 223 (6th Cir. 1928) 29

Takahashi v. Fish & Game Comm. of California, 334 U.S. 410 (1948) 27

U.S. v. Brignoni-Ponce, ____ U.S. ____, 95 S.Ct. 2590 (1975) 9, 12

United States v. Mack, 112 F.2d 290 (2d Cir. 1940) 29

United States v. Smith, 112 F.2d 83 (2d Cir. 1940) 29

Constitutional Provisions, Statutes & Regulations:

California Labor Code §§ 200-227 15

California Labor Code §§ 1171-1204 15

California Labor Code § 2805 ..... 7, 14, 15, 16, 17, 19, 28, 30, 31, 32, 33, 34

California Labor Code §§ 6300-6320 15

Connecticut General Statutes § 31-51K 7

Kansas Statutes Annotated § 21-4409 7

U.S. Const. Art. I §8, cl. 8 ..... 24, 25

U.S. Const. Art. I § 10 34

U.S. Const. Art. VI, cl. 2 ..... 22, 27

	Page
7 U.S.C. 2044b(6)	32
7 U.S.C. § 2045(f)	32
7 U.S.C. § 2050(d)	32
7 U.S.C. § 2051	18, 32
8 U.S.C. § 1101(a)(15)(H)	17, 29, 30, 31
8 U.S.C. § 1182(a)(14)	17, 31
8 U.S.C. § 1184	29
8 U.S.C. § § 1321-1330	17, 29
8 U.S.C. § 1324(a)(3)	29, 33
Section 8 of Immigration Act of February 5, 1917, 39 Stat. 874	29
20 CFR § 602.10(e)(3)	31
20 CFR § 602.10(e)(5)	31, 32
8 California Administrative Code § § 16209-16209.6	31

Publications:

Briggs, *Illegal Immigration and the American Labor Force: The Use of "Soft" Data for Analysis*, The Conference on Measurement of Social and Economic Data and Public Policy (University of Texas, 1975)	10
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Cardenas, *United States Immigration Policy Toward Mexico: An Historical Perspective*, 2 CHICANO L.REV. 66 (1975)	5
Greene, *Immigration Law and Rural Poverty–The Problems of the Illegal Entrant*, 1969 DUKE L.J. 475	9

	Page
Hart & Sachs, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, (Tent. ed. 1958)	23
Note, *Preemption As a Preferential Ground: A New Canon of Construction*, 12 STAN. L.REV. 208 (1959)	23
Note, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, 46 SO.CALIF. L.REV. 567 (1973)	5
Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L.REV. 623 (1975)	18, 19, 24
Ortega, *Plight of the Mexican Wetback*, 58 A.B.A.J. 251 (1972)	10

Miscellaneous:

Congressional Digest, January, 1975	14
Hearings on "Illegal Aliens" before Subcommittee No. 1, Committee on the Judiciary, 92d Cong., 1st Sess. (Serial No. 13, pts. 1-5; 1972)	9, 13, 14
"Illegal Aliens," A Review of Hearings Conducted During the 92d Congress (Serial No. 13, pts. 1-5) by Subcommittee No. 1, Committee on the Judiciary, 93d Cong., 1st Sess. U.S. Government Printing Office, Washington: 1973	8, 9
Sen. Rpt. No. 748, 89th Cong., 1st Sess. (1965)	17, 30, 31
1974 Annual Report: Immigration and Naturalization Service	10, 12

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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, is reported at 40 Cal.App. 3d 976, 115 Cal. Rptr. 444 (1974) and is reprinted in the Appendix to the Petition for Writ of Certiorari. (A. Pet.Cert. 1a-6a). The order of the Supreme Court of

California denying petitioners' petition for hearing is reprinted at A.Pet. Cert. 1b.

JURISDICTION

The judgment of the Court of Appeal was entered on July 26, 1974 (A.Pet.Cert. 1a-6a). A timely petition for hearing was denied by the Supreme Court of California on October 24, 1974 (A.Pet.Cert. 1b). A timely petition for writ of certiorari was filed with the Court on January 17, 1975, and was granted on June 23, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

QUESTIONS OF LAW PRESENTED

1. Is California Labor Code § 2805, enacted to protect California citizens and lawful resident aliens from unemployment caused by competition from illegal aliens, a legitimate exercise of California's police power?

2. Did the lower court fail to apply the principles announced by this Court in recent decisions by invalidating state legislation which touches on, but does not conflict with, federal law?

STATEMENT OF THE CASE

This litigation began when petitioners, migrant farmworkers, commenced an action pursuant to

California Labor Code § 2805[1] in the Superior Court for the County of Santa Barbara against respondents, farm labor contractors. The complaint alleged that petitioners had performed satisfactory employment for respondents as farmworkers from June 5, 1972 through September 28, 1972; that petitioners were lawful residents and lawful workers at all times; that on or about September 28, 1972, and at all times thereafter, respondents refused employment to petitioners on the ground that respondents had a surplus of labor; that part of said labor supply consisted of aliens illegally present in this country; that respondents are open and notorious employers of illegal aliens and encouraged illegal aliens to compete with local workers for jobs to depress local wages and working conditions; and that respondents' practices constituted the knowing employment of aliens not legally admitted to lawful residence in the United States which has an adverse effect on lawful resident workers in violation of California Labor Code § 2805(a) and (c). Petitioners sought their reinstatement to employment by respondents and a

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[1] California Labor Code § 2805 provides:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be bar to civil action against the employer based upon violation of subdivision (a)."

permanent injunction against respondents' willful employment of illegal aliens. (App. 3a).

Respondents answered petitioners' complaint by filing a demurrer which challenged the constitutionality of California Labor Code § 2805 on the ground that the statute is preempted by federal immigration law. (App. 15a). On February 14, 1973, the trial court declared California Labor Code § 2805 unconstitutional on preemption grounds and dismissed the complaint. (App. 16a). Petitioners' appealed the trial court's decision. The California Court of Appeal, Second Appellate District, affirmed (A.Pet.Cert. 1a-6a) and the Supreme Court of California denied petitioners' request for a hearing. (A.Pet.Cert. 1b). A petition for writ of certiorari seeking review from the Court of Appeal's decision was filed with this Court on January 17, 1975. On June 23, 1975, this Court granted certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const. Art. I § 8, cl.8.
2. U.S. Const. Art. I § 10, cl.1.
3. 7 U.S.C. § 2044b(6).
4. 7 U.S.C. § 2045(f).
5. 7 U.S.C. § 2051.
6. 8 U.S.C. § 1101(a)(15)(H).
7. 8 U.S.C. § 1182(a)(14).
8. 8 U.S.C. § 1324(a)(3).
9. 20 C.F.R. § 602.10(e)(1).
10. 20 C.F.R. § 602.10(e)(2).
11. 20 C.F.R. § 602.10(e)(3).
12. 20 C.F.R. § 602.10(e)(5).
13. California Labor § 2805.

INTRODUCTION

I.

BACKGROUND LEADING TO THE ENACTMENT OF CALIFORNIA LABOR CODE § 2805.

California's first attempt to diminish the impact of the seemingly unstemmable flow of illegal aliens was initiated by a number of Mexican-American farmworkers.[2] In 1968, they filed a lawsuit seeking to apply a state statute proscribing "unlawful or unfair business practices" in the illegal alien context. *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d 588 (3rd Dist.) (1970). They contended that it was an "unfair business practice" for an employer to knowingly hire illegal aliens in preference to domestic labor. The Court comprehensively reviewed the extent and impact of illegal aliens on the employment opportunities of domestic labor. It concluded that "[t]he domestic farmworkers' need for protection against the job competition of illegal entrants is undeniable, the public benefits palpable." *Id.*, 596. In particularly strong language, the Court described the condition of the domestic farmworker:

> "Ever since the depression era of the thirties, the dismal plight of the American farmworker has been heavily annotated in an interminable flow of

[2] *See generally*, Note, *State Regulation of the Employment of Illegal Aliens: A Constitutional Approach*, 46 SO. CAL. L. REV. 565 (1973); Cardenas, *United States Immigration Policy Toward Mexico: A Historical Perspective*, 2 CHICANO L. REV. 66, 79-89 (1975).

> congressional hearings and reports, public surveys and social commentaries. . . . Despite decades of protest and officially expressed concern, there has been no solution to the dilemma posed by agriculture's heavy short-term need for manpower and society's inability to absorb that manpower when agriculture's need is past. From Steinbeck's Grapes of Wrath to the present, the thin gruel of public welfare handouts has been farm labor's principal progress to the goal of social justice." *Id.*, 596-97.

The Court then went on to describe how the general plight of the domestic farmworker was compounded by the influx of illegal aliens:

> "Capture of a sizeable share of the farm employment market by invading illegal entrants is a superimposed source of deprivation. The Immigration and Nationality Act. . . expresses a national policy to preserve the available employment market for domestic workers. Partial expropriation of the farm job market by illegal entrants represents an abject failure of national policy . . . [which] must be ascribed to the self-imposed impotence of our national government. . . ." *Id.*, 597.

In spite of the Court's appreciation of the problem, relief was denied. *Id.*, 599-600. Shortly thereafter, two other similar attempts were similarly unsuccessful. *Cobos v. Mello-dy Ranch*, 20 Cal. App. 3d 947 (1st Dist.) (1971); *Larez v. Oberti*, 23 Cal. App. 3rd 217 (5th Dist.) (1972).

Failing in the judicial forum, California's farmworkers went into the legislative arena and there succeeded. Recognizing the limitations of the federal system and the acute problems created by the presence of illegal

aliens in California, the State Legislature in 1971 attempted to partially ameliorate the problem by enacting Labor Code § 2805 which prohibits any employer from knowingly employing aliens not entitled to legal residence in the United States. Labor Code § 2805 is not limited to the farm labor context in recognition of the fact that illegal aliens exist in very substantial numbers in urban areas (see pp. 10-16, *infra)* as well thus also depressing the urban labor market.

In enacting the statute, California has sought to create both criminal and civil sanctions against employers who hire illegal aliens. California has a legitimate interest in protecting its fiscal interests and labor market by enacting legislation designed to prevent the use of labor by employers that, as Congress and others have recognized, depresses wages and the economy. Labor Code § 2805 focuses its regulatory prohibition directly at the source of the problem, namely the hiring practice of employers, a practice recognized to be injurious to the state's economic interests. California's geographic proximity to the Mexican border gives it an unusually strong interest and the federal government's apparent ineffective control of illegal entry by aliens makes the employment of illegal aliens a legitimate concern of the state.[3]

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[3]Other states have expressed similar concerns by enacting comparable legislation. *See*, Kan. S.A. Section 21-4409; Conn. Gen. Stats. Section 31-51k. However, the Connecticut statute appears to have been declared unconstitutional as a denial of equal protection to illegal aliens in *Marin v. Smith*, 376 F. Supp. 608, 609, n.2 (D. Conn. 1974); *see also, Nowzewski Polish Style Meat Products, Inc. v. Meskill*, 376 F. Supp. 610 (D. Conn. 1974). It appears that the decision is erroneous since it relied on

II.

GENERAL BACKGROUND OF THE SOCIAL AND ECONOMIC IMPACT OF ILLEGAL ALIENS ON THE UNITED STATES AND CALIFORNIA.

A. The United States

Summarizing the impact of persons illegally present throughout the country, the United States Department of Labor has observed that illegal aliens: (1) take jobs which normally would be filled by American citizens; (2) depress the wages and impair the working conditions of American citizens; (3) increase the burden of American taxpayers through added welfare costs; (4) reduce the effectiveness of employee organizations;[4] (5)

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equal protection decisions of this Court which hold that *lawfully* admitted aliens cannot be denied rights which are available to U.S. citizens. The Connecticut and California statutes distinguish between classes of aliens on an obviously rational basis: the legality of their entry into the country.

[4] A Congressional Committee has made this observation as well:

> Because the illegal aliens are themselves in violation of the law and risk deportation, or, in the case of illegal entry, criminal penalties, unscrupulous employers are able to exploit them without fear of being reported. According to the testimony, this exploitation takes a number of forms, including substandard wages and the denial of health protection, insurance, over-time, and other fringe benefits. The net effect is not only the displacement of American labor because of unfair competition, but, in the long run, a depression of wages and a lower standard of living where a supply of cheap alien labor is readily and dependably available. "Illegal Aliens," A Review of Hearings Conducted

secure jobs, services, and resources directly and indirectly from many federal and state programs, thus diverting scarce resources from American citizens; and (6) constitute for employers an unskilled group rich for exploitation[5] – aggressive, enterprising workers with low-wage demands.[6]

During the 92d Congress (Serial No. 13, pts. 1-5) by Subcommittee No. 1, Committee on the Judiciary, 93 Cong., 1st Sess. U.S. Government Printing Office, Washington: 1973, p. 12. (Hereinafter "Review")

See also, Briggs, *Mexican Migration and the U.S. Labor Market: A Mounting Issue For The Seventies* (Studies in Human Resource Development, No. 3; University of Texas, 1975) (hereafter, "Briggs"), p. 26, citing Samora, J., *Los Mojados: The Wetback Story* (Notre Dame, Indiana: Notre Dame Press, 1971), Chapter II.

[5] Illegal Mexican aliens have been used as strike breakers and in that capacity have made it incredibly difficult for farm laborers to unionize. ("Chavez Charges Scheme," *Washington Post,* September 23, 1974.) Cesar Chavez has also stated:

> "The illegal workers from Mexico are a severe problem. It is a problem that is out of control . . . we say, let them come in with their families, if the country needs them. Let them be legal. Then they will stand up to their rights." Richard Severo, "The Flight of the Wetbacks", *New York Times Magazine,* March 10, 1974, p. 84.

This Court's recognition that illegal aliens frustrate unionization, especially in such occupations as farm work is expressed in *U.S. v. Brignoni-Ponce,* ___ U.S. ___, 95 S. Ct. 2590 (1975). See also, Greene, *Immigration Law and Rural Poverty-The Problems of the Illegal Entrant,* 1969 DUKE L.J. 475, 488-89.

[6] *See,* remarks of Robert Brown, Associate Manpower Administrator, U.S. Training and Employment Services, Department of Labor, in Hearings on "Illegal Aliens" before Subcommittee No. 1, Committee on the Judiciary, 92d Cong., 1st Sess. (Serial No. 13, pts. 1-5), (1972), pt. 5, p. 1356, (Hereinafter "Hearings").

Additionally, the use of illegal alien labor is often accompanied by abusive and unfair labor practices. For example, illegal aliens who are apprehended usually leave the country under the "voluntary departure" procedure. The illegal entrant is advised of his right to a deportation hearing and if he waives the right, he will be returned to the country of his origin. Employers who make a practice of hiring illegal aliens are aware of these "voluntary departures" and rely on them to reduce payroll expenditures. When apprehended the employer usually denies that he owes the worker back wages. The employer knows that the worker will have "voluntarily departed" from the country within hours of apprehension and will be unable to pursue a wage claim.[7]

While it is difficult to obtain accurate data on illegal aliens,[8] the parameters of their impact can be described. Thus, the Immigration and Naturalization Service (hereinafter "INS") apprehended 788,145 illegal aliens in the United States during fiscal year 1974.[9] The Commissioner of INS, Leonard F. Chapman, Jr. put the estimate of the total number of illegal aliens in the United States, however, at at least 6 to 8 million

[7] *See,* Ortega, *Plight of the Mexican Wetback,* 58 A.B.A.J. 251, 252 (1972).

[8] *See,* e.g., the discussion of this problem in Vernon M. Briggs, Jr., *Illegal Immigration and the American Labor Force: The Use of "Soft" Data for Analysis,* The Conference on Measurement of Social and Economic Data and Public Policy, University of Texas, Austin, Texas, April 10-11, 1975.

[9] 1974 Annual Report: Immigration and Naturalization Service, p. 9 (hereinafter "INS: 1974 Annual Report").

persons and possibly as great as 10 or 12 million.[10] Of this number of illegal aliens in the country, INS projects that it will apprehend only one million in fiscal year 1975.[11]

While it has been suggested that illegal aliens earn $10 billion a year, an investigator of the INS stated that it is estimated that $10 billion in earnings is *sent out of the country* by illegal aliens and that at least $100 million in income taxes is evaded by these aliens.[12]

[10] *Id.* at p. iii. Former Attorney General William B. Saxbe stated that approximately 7 to 13 million illegal aliens are in the country. "Illegal Aliens Cost One Million Jobs: Saxbe," *Orlando Sentinal Star,* October 31, 1974, p. 6-A. *The Christian Science Monitor* estimates 7 million illegal aliens in the country while asserting that estimates range from between 3 million to as many as 12 million. "Jobs and Illegal Aliens," *Christian Science Monitor,*" March 20, 1975, p. 12.

[11] "Restrictions Aren't the Answer: The Illegals." *The New Republic,* February 22, 1975.

[12] "Illegal Aliens Earn $10 Billion A Year, Investigator Says," *New York Times,* Dec. 11, 1974. The same article suggests that the $10 billion is earned by roughly 6 million illegal aliens. Other estimates put the number of illegal aliens holding jobs at approximately 1 million. See, e.g., former Attorney General William Saxbe's statement in "Illegal Aliens Cost One Million Jobs: Saxbe," *Orlando Sentinel Star,* October 31, 1974, p. 6-A; statement of Leonard F. Chapman, Jr., Commission of INS, in "The Enterprising Border Jumpers," *Time,* May 19, 1975, pp. 14-15; *The Christian Science Monitor,* "Jobs and Illegal Aliens," March 20, 1975, p. 12.

See also, "False Identities Costly to Nation," *New York Times,* April 11, 1975, p. 7. The *Washington Star-News* stated that most illegals mail sums of largely untaxed money home to support their families. *Id.,* "Human Tide Cuts Deeply in America," Nov. 16, 1974, p. A-8.

The influx of illegal aliens is particularly acute in those states which have a common border with Mexico. One commentator has asserted that "the primary characteristic of the migration of Mexicans . . . is *not* legal migration, but rather it is illegal migration."[13] Thus, of the 788,145 illegal aliens arrested by INS in fiscal 1974, 709,959 or 90% were nationals of Mexico.[14]

INS has referred to the number of illegal entries across the southern border as a "virtual flood." (INS 1974 Annual Report, p. 9) and admits its inability to meet the situation:

> "Persons are illegally entering the country across our borders and through our ports of entry by the millions, far outstripping INS capability to enforce adequately the laws pertaining to entry and residence." (INS: 1974 Annual Report, p. iii)

The INS is simply too understaffed to be able to detect every illegal entry. This Court has noted the failure of the border check point system for detection of illegal entries:

> "The entire system [check point system], however, has been notably unsuccessful in deterring or stemming this heavy flow. . . Perhaps the judiciary should not strain to commodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness. . . ." *U.S. v. Brignoni-Ponce*, ____ U.S. ____, 95 S.Ct. 2590, 2598 (1975) (White and Blackmun, J.J., concurring.)

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[13]Briggs, *supra*, n. 4, at 3 (emphasis in original).

[14]INS: 1974 Annual Report, p. 9.

Commissioner Chapman suggests that Mexican nationals comprise half of his own estimate of 6 to 8 million illegal aliens presently in the country.[15] Furthermore, all available evidence indicates that illegal aliens from Mexico come to the United States primarily to obtain employment.[16]

B. California

California's common border with Mexico and its extensive agrarian economy (which includes 81,000 square miles of farms in the San Joaquin Valley alone)[17] make the state a particular attraction for illegal entrants. In fact, Commissioner Chapman estimates that, presently, at least 1.5 million illegal aliens are residing in California. (Chapman Address)

California's recent economic history is replete with the insurgence of illegal entrants and their impact on the economy. In 1971, when 595,000 Californians were unemployed (7.4% of the state's labor force), there were between 200,000 and 300,000 illegal aliens

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[15]Address by Leonard F. Chapman, Jr., Commissioner, Immigration and Naturalization Service, before the Los Angeles World Affairs Council, Los Angeles, California, April 10, 1975 (hereinafter "Chapman Address").

[16]*See, e.g., Hearings, supra;* n. 6, pt. 4, p. 1119; *Review, supra*, n. 4, p. 5. In Fact, Congressman Leo J. Ryan observed that "the agricultural economy is based on the use of illegal aliens at a fairly low wage." "Illegal Aliens earn $10 Billion a Year, Investigator Says," *New York Times*, December 11, 1974.

[17]"Human Tide Cuts Deeply In America," *Washington Star-News*, November 16, 1974, p. A-8.

employed in California earning approximately $100 million in wages. (*Hearings, supra,* n.6, pt. 1, p. 208). A 1970 U.S. Department of Labor study estimated the annual wage drain attributable to illegal aliens in California agriculture to exceed $180 million. The study reflected that 67,437 illegal entrants were apprehended in California in fiscal 1970. (*Hearings, supra,* n.6, pt. 1, pp. 99-100). A 1973 report stated that the U.S. Border Patrol in California averaged over 11,000 arrests of illegal aliens each month. (*Washington Post*, December 9, 1973, p. 16). A more recent report stated that the border patrol had been apprehending 200 illegal aliens per day in Los Angeles and Orange Counties before funds were cut to the extent that only 75 to 100 per day could be apprehended; about 200,000 illegal aliens were caught in Southern California in 1974 and about 180,000 of them in the Los Angeles area; 32,000 illegal aliens are employed in San Francisco; 120,000 illegal aliens are believed to be working in California's central valley doing agricultural work.[18] Moreover, INS reports that Los Angeles has approximately 135,000 illegally-employed aliens.[19]

California Labor Code § 2805 is a limited labor statute which proscribes a specific employment activity. The underlying purpose of § 2805 is a state labor policy designed to protect California wage-earners. It seeks to curtail the influx of illegal entrants and their partial expropriation to California's labor market by establishing a statutory scheme to protect domestic

[18]"Rising Flood of Illegal Aliens," U.S. News & World Report, February 3, 1975, pp. 27-30.

[19]Congressional Digest, January, 1975, p. 8.

laborers.[20] Labor Code § 2805 is an incidental part of comprehensive California state labor legislation which regulates a variety of employer related activities. This includes the use of child labor, Labor Code §§ 1171-1204; standards related to wages, Labor Code §§ 200-277; and health and safety standards, Labor Code §§ 6300-6320, among others. The statute's approach, to impose criminal and civil sanctions on employers who knowingly employ illegal aliens, is a

[20]Other adverse effects of illegal aliens include the over-burdening of federal and state public assistance programs, as well as other benefit and service programs, including the public schools. In California the total additional expense for educating 659 illegal alien students in Orange County was 2.6 million dollars; San Diego County said its medical cost for the care of illegal aliens was $578,307 in 1974 and is expected to rise above $600,000 in 1975; two San Diego hospitals reported spending 1.9 million dollars last year between them on treatment of illegals ("Human Tide Cuts Deeply in America," *Washington Star-News,* November 16, 1974, p. A-8). Medical costs in Los Angeles County exceeded $8 million while in 1973, medical costs in 28 California counties for illegal aliens exceeded $11 million. (Chapman Address)

In his address, Commissioner Chapman pointed out that certain California Members of Congress had introduced a bill to require the federal government to absorb such medical costs. Chapman stated that the California sponsors claim that California spends more than $20 million annually in medical care for illegal aliens. Mr. Chapman's reference to the bill was not specific but petitioners note that on February 24, 1975, Mr. Sisk of California and others introduced H.R. 3609 into the 1st Session of the 94th Congress. H.R. 3609 would amend the Public Health Service Act to allow medical facilities, which treat aliens who are unlawfully in the U.S. and who cannot pay their bills or who can only pay part thereof, to apply to the Secretary of HEW for reimbursement of that portion of the cost which is unpaid if the facility is not eligible to recover the amount under any other public assistance program.

legitimate state response to protect the welfare of domestic labor[21] and focuses directly on the source of the problem, namely the hiring practice of local employers, a practice recognized to be injurious to the state's economic interests and the individual economic interests of a substantial segment of its labor force, the domestic farm laborer.

SUMMARY OF ARGUMENT

A. California Labor Code § 2805, which prohibits an employer from knowingly employing illegal aliens, is not preempted by federal law since there is no textual evidence in the Immigration and Nationality Act, 8 USC § § 1101 et seq., or its legislative history which supports a claim that it is "the clear and manifest purpose of Congress," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963), to reject the aid of the states in controlling the flow of illegal aliens into the various states. Before a claim that Congress has "occupied" a subject area in its entirety so as to preempt *any* state action will be recognized, it must appear that "Congress has unmistakenly so ordained," *Id*., 142, and that the state law in question is "absolutely and totally contradictory and repugnant." *Goldstein v. California*, 412 U.S. 546, 553 (1973). None of these standards are met in this case.

B. For decades, where Congress has not clearly manifested an intent to "occupy" a particular subject

[21]The use of the term "domestic labor" in this brief is meant to include lawful resident alien labor as well.

of regulation, a state may legislate pursuant to its police power so long as such legislation does not conflict with and frustrate federal law. *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, 141. If any conflict is found then State law is to be preempted " 'only to the extent necessary to protect the achievement of the aims of the' " federal law in question, *Merrill Lynch, Pierce, Fenner and Smith v. Ware*, 414 U.S. 117,127 (1973), since "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one ousted.' " *Ibid.*

A principle purpose of the Immigration and Nationality Act (INA) is "to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market. . . ." Sen. Rpt. No. 748, 89th Cong., 1st Sess., p.10 (1965). This has been the historical purpose of immigration laws, *Karnuth v. United States*, 279 U.S. 231, 243 (1929), and it is expressly embodied in several provisions of the INA [§ § 101(a)(15)(H)(ii), 214 (a)(14), 271-80, 8 USC § § 1101(a)(15)(H)(ii), 1182(a)(14), 1321-30]. The purpose of Labor Code § 2805 is fully congruent with the purpose underlying such federal law.

Federal law other than the INA not only reveals a similar purpose but it also demonstrates a clear Congressional intent to encourage the states to employ such means as Labor Code § 2805 to protect local labor markets. In 1974, the Farm Labor Contractor Registration Act (FLCRA), 7 USC § § 2041-55, was amended to prohibit farm labor contractors from employing illegal aliens. Pub. Law 93-518, § § 7, 10. The act expressly

states that its provisions "are intended to supplement State action." 7 USC § 2051. Therefore, Labor Code § 2805 is clearly a valid exercise of California's police power, an exercise which will relieve its citizens of a substantial tax burden caused by the severe impact of illegal aliens upon its labor force and enhance the employment opportunities of significant component of that labor force.

ARGUMENT

I.

CALIFORNIA LABOR CODE § 2805, ENACTED TO PROTECT CALIFORNIA CITIZENS AND LAWFULLY RESIDENT WORKERS FROM UNEMPLOYMENT CAUSED BY COMPETITION FROM ILLEGAL ALIENS, IS A LEGITIMATE EXERCISE OF CALIFORNIA'S POLICE POWER.

A. The Parameters of the Preemption Doctrine.

When federal and state laws regulate in the same area, this Court has evolved two approaches in determining the question of the validity of the specific state law in question. The first approach, often called "occupation," renders the state attempt to regulate invalid *even though* it generally may be agreed that the state scheme does not impair but enhances and aids in the achievement of the federal goals. *See generally*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L.

REV. 623, 625, 642-46 (1975). The second approach, often called "conflict," renders the state attempt invalid only if it conflicts with and impairs the federal scheme. *Id.*, at 626, 646-49. The Court below held that Labor Code § 2805 was preemptively invalid because it concluded that Congress "occupied" the field of immigration through its enactment of the Immigration and Nationality Act (8 U.S.C. § § 1101, *et seq.*). (A. Pet. Cert. 4a-6a). The Court erred.

It will be helpful to briefly summarize the nature of these two branches of this Court's preemption doctrine before specifically turning to the error of the Court below.

1. Occupation.

A judicial preemption decision based upon "occupation" should not be rendered lightly since one consequence may be to strike down state laws which *aid* a federal regulatory scheme. To reject help is far different than spurning that which hinders. For that reason, a Court must discern a congressional intention to occupy as "the clear and manifest purpose of Congress." *Florida Lime and Avocado Growers, Inc., v. Paul*, 373 U.S. 132, 146 (1963). As the Court has cautioned recently:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. *It will not be presumed* that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. *The exercise of federal supremacy is not lightly to be presumed.*" [Citation omitted.] *New*

> *York Dept. of Soc. Services v. Dublino*, 413 U.S. 405, 413 (1973) (emphasis added).

In other words, to find an intent to preemptively occupy, it must be demonstrated from the text of the Act of Congress or its legislative history that "Congress has unmistakably so ordained." *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, at 142. Without a very firm foundation based upon an explicit Congressional declaration, or readily apparent legislative history, talismanic invocation of phrases such as "comprehensive federal scheme" would mean "setting aside great numbers of state statutes to satisfy a Congressional purpose which would be only the product of this Court's imagination." *California v. Zook*, 336 U.S. 725, 732 (1949). Preemption by a finding of "occupation" is often disparaged:

> "Little aid can be derived from the vague and illusory but often repeated formula that Congress by 'occupying the field' has excluded from it all state legislation. . . . Every act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history." *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941).

Even when Congress acts pursuant to one of the specific powers expressed in the Constitution, such as the power to regulate copyrights, such exercise will be held to preempt state copyright law by occupation only when such a state law would be "absolutely and totally contradictory and repugnant." *Goldstein v. California*,

412 U.S. 546, 553 (1973). The *Goldstein* test for repugnancy is simple: federal power is exclusive over "matters which are *necessarily* national in impact." *Id.*, at 554 (emphasis in original). But, "necessarily national" matters are to be further analyzed to distinguish between those cases in which conflicts "may possibly arise," since such cases may permit state action, and those totally impermissible cases, where preemption is necessarily mandated, since conflicts "will necessarily" arise. *Id.*, at 554.

2. Conflict.

Historically, where Congress has not clearly manifested an intent to "occupy" a particular subject of regulation, a state may legislate pursuant to its police powers so long as such legislation does not conflict with and frustrate federal law.[22]

A determination of preemption on the basis of "conflict" is at bottom a determination that "turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v.*

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[22] *Reid v. Colorado*, 187 U.S. 137 (1902) (prohibition on introduction of diseased cattle valid); *Savage v. Jones*, 225 U.S. 501 (1912) (state requirement that certain labels reveal package contents valid); *Carey v. South Dakota*, 250 U.S. 118 (1919) (state prohibition of shipment of wild ducks by common carrier valid); *Mintz v. Baldwin*, 289 U.S. 346 (1933) (inspection of cattle for infectious diseases not preempted); *Maurer v. Hamilton*, 309 U.S. 598 (1940) (state highway regulation not preempted); *Retail Clerk's Int. Assn. v. Schermerhorn*, 375 U.S. 96 (1963) (state labor legislation not preempted).

Lockheed Air Terminal, Inc., 411 U.S. 624, 638-39 (1973). "[P]rior cases on preemption 'are not precise guidelines'" for this reason. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware*, 414 U.S. 117 (1973), quoting *City of Burbank v. Lockheed Air Terminal, Inc., supra.* But some guidelines can be derived from the "conflict" cases. First, "[c]onflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial." *New York State Department of Social Services v. Dublino, supra*, at 423, n. 29.

Second, when potential conflict appears, a detailed examination must be undertaken of the respective *purposes* of the federal law and the potentially conflicting state law. Such an inquiry is necessary since in this form of the preemption doctrine, state law will be preempted "'only to the extent necessary to protect the achievement of the aims of the'" federal law. *Merrill Lynch, Pierce, Fenner, and Smith v. Ware, supra*, at 127, quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963). The Court's preference is always to sustain the state law to the extent that to do so does not run afoul of the pertinent federal purpose and, thereby, of the Supremacy Clause, Art. VI of the U.S. Constitution; that is the very essence of federalism. A finding of state impairment of federal purpose is the key since conflict exists only when "the state regulation 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Florida Lime and Avocado Growers, Inc. v. Paul, supra*, at 141, quoting *Hines v. Davidowitz, supra*, at 67.

Several commentators have suggested that the only proper method of preemption analysis lies in the

"conflict" approach because of the inherent pitfalls of the discernment of legislative intent in the "occupation" branch of the doctrine. *See e.g.*, Note, *Preemption As A Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 209-10 (1959); Hart & Sachs, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, 97-102 (tent. ed. 1958).

The Stanford Law Review Note (at p. 209) observed that:

> By framing the preemption question is terms of specific congressional intent [citation omitted] the Supreme Court has manufactured difficulties for itself. Apart from the difficult problem of defining which Congress and which congressman's intent is relevant, [citation omitted] this manner of stating the issue suggests that the preemption question was consciously resolved and that only diligent effort is needed to reveal the intended solution.

The Note (at p. 210) then characterized the suggested analysis of the several other commentators as follows:

> [T]he proper approach is to determine whether the continued existence of the state law is consistent with the general purpose of the federal statute by seeking to define the evil Congress sought to remedy and the method chosen to effecuate its cure, . . . Most of the cases appear to have adopted this approach, although lip service is still paid to the specific intent inquiry.

3. Recent Preemption Decisions of this Court.

Recent decisions of this Court regarding problems of federal preemption have sought to balance state and

federal interests have apparently followed the comments set forth above. *Goldstein v. California*, 412 U.S. 546 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). *See generally*, Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and The Burger Court*, 75 COLUM. L. REV. 623 (1975). This recent preemption trilogy has validated state laws in instances where provisions of state law and federal law may differ but where the purpose of the two schemes do not conflict. Moreover, the state law has been validated even where the subject matter regulated has implications beyond the state's boundaries.

Thus, in *Goldstein v. California*, 412 U.S. 546 (1973), the Court protected the state's right to prohibit the reproduction of phonograph records from misappropriated copies by narrowly construing the preemptive scope of the copyright clause, U.S. Const. Art. I, § 8, cl. 8. In affirming a conviction under a California statute making record piracy a criminal offense, the Court considered but rejected the constitutional claim that the copyright power, by its own force, notwithstanding the absence of any federal regulation of the matter, precluded concurrent state legislation, i.e., preempted by "occupation."

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973), involved a New York State Exchange rule enacted pursuant to the Securities Exchange Act, 15 U.S.C. § 78(f) (1970), requiring arbitration of claims involving employment termination and the employee's forfeiture of certain benefits, which conflicted with a California law which disregarded both

forfeiture and arbitration. In resolving the conflict, this Court studied the relationship between the purpose of the exchange rules and the purpose of the California law. State law conflicting with the federal law was to be preempted " 'only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act.' " *Id.*, 127. The employee arbitration rule was held to be ancillary to the federal law's purpose of insuring fair dealing and of protecting investors, and thus did not preempt state law. *Id.*, 130, 134-136. The Court noted that its "analysis is to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one ousted.' " *Id.*, 127, citing *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). The Court further noted that "[t]his approach is supported by decisions extending back to the turn of the century." *Id.*, 127, n.8, citing cases.

Finally, in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974), the Court considered whether a state trade secret statute conflicted with the patent clause of the U.S. Const. Art. I., 8, cl. 8 even as applied to patentable inventions which would provide a monopoly in perpetuity rather than for 17 years under the federal patent law:

> "The question of whether the trade secret law of Ohio is void under the Supremacy Clause involves a consideration of whether that law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. . . . Trade secret law and patent law have co-existed in this country for over one hundred years. *Each has its particular role to play, and the operation of one does not take away from the need for the other.*" *Id.*, 493 (emphasis added).

Relying on *Goldstein*, the *Kewanee* Court upheld the state trade secret statute after comparing its purpose, scope of application, and results as to various products and after finding no significant conflict between state law and federal patent policy.

The present case requires, in light of the present status of preemption law articulated in the recent trilogy, a review of federal legislation to determine: (1) is it "the clear and manifest purpose of Congress," *Florida Lime and Avocado Growers, Inc. v. Paul, supra,* at 146, to totally exclude the states from exercising their police power to diminish the impact of illegal aliens on their labor markets – that is, is such state legislation "absolutely and totally contradictory and repugnant," *Goldstein v. California, supra,* at 553, to federal law; (2) or, if some power is retained by the states in the face of a companion scheme of federal legislation, is there "such actual conflict between the two schemes of regulations that both cannot stand in the same area." *Florida Lime and Avocado Growers, Inc. v. Paul, supra,* at 141.

B. Congress Has Not Occupied The Field So As To Preempt Labor Code §2805.

While it is true that "[t]he National Government has 'broad constitutional powers in determining what aliens shall be admitted to the United States,' " *Graham v. Richardson,* 403 U.S. 365, 377 (1971), that fact does not, *in itself,* establish a Congressional intent to occupy the field in accordance with this Court's standards. *Graham*, like prior cases in which the supremacy of

federal law in the area of immigration was discussed, involved *legally* resident aliens who complained of contradictory or additional burdens imposed upon them by state laws. As the Court said,

> " 'State laws which impose discriminatory burdens upon the entrance or residence of aliens *lawfully within the United States,* conflict with [the] constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.' " *Id.*, 378, quoting *Takahashi v. Fish and Game Comm. of Calif.*, 334 U.S. 410, 419 (1948) (emphasis added).

This case involves only *illegal* aliens.

Hines v. Davidowitz, 312 U.S. 52 (1941) is also inapposite. In *Hines,* this Court reviewed the validity of a Pennsylvania alien registration act the provisions of which conflicted in several particulars with the federal alien registration act. Davidowitz, an alien *legally* resident in Pennsylvania, challenged the state statute. One of his contentions was that federal power in this area was exclusive (i.e., the federal government had "occupied" the field). *Id.*, 61. The Court rejected the invitation to pass on this question saying that it was "expressly leaving open . . . the argument that the federal power in this field . . . is exclusive." *Id.*, 62. The Court proceeded, consistent with the Supremacy Clause of Article VI, upon the recognition "that whatever power a state may have [in this field] is subject to supreme national law." *Id.*, 68. Accordingly, the Court ruled that Pennsylvania's legislation was invalid because it conflicted with supervening federal law. ("Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress." *Id.*, 67.)

There is no doubt that immigration, and the standards regarding who shall be allowed entry and under what conditions, *is* one of those "matters which are *necessarily* national in impact." *Goldstein v. California, supra,* 154 (emphasis in original).[23] However, Labor Code § 2805 in no way impinges upon that federal power since it does not seek to regulate immigration; it regulates employment. It has an incidental *impact* on immigration. Therefore, as the Court said in *Goldstein*:

> "We must also be careful to distinguish those situations in which the concurrent exercise of power by the Federal Government and the States or by the States alone *may* possibly lead to conflicts and those situations where conflicts *will necessarily* arise. 'It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of state sovereignty. THE FEDERALIST No. 32, p. 243, (B. Wright ed. 1961).'" *Id.*, 554-55 (emphasis in original).

As the following section will demonstrate in detail, Labor Code §2805 will neither possibly nor necessarily conflict with federal law.

It also does not appear that *mere* "knowing" or "willfull" employment of an illegal alien will subject an employer to prosecution for harboring. The statute

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[23]Since the problems caused by illegal aliens are particularly acute for those border states with high demand for agricultural labor, regulation of the employment of illegal aliens is *not* "necessarily national" in character. This Court has been particularly sensitive to the peculiarly acute needs of certain states when it has been confronted with a preemption claim. *See e.g., California v. Zook, supra,* at 735-36.

indicates that there must also be acts of concealment or shielding from detection as well before criminal liability attaches. While there has been no specific interpretation of the term "harbor" in § 274(a)(3), its predecessor, § 8 of the Immigration Act of February 5, 1917, 39 Stat. 874, contained the same term and it has received such an interpretation. *Susnjar v. United States,* 27 F.2d 223, 224 (6th Cir. 1928) ("we conceive the natural meaning of the word 'harbor' to be to clandestinely shelter, succor, and protect improperly admitted aliens. . . ."). *See also, United States v. Smith,* 112 F.2d 83, 85 (2d Cir., 1940); *United States v. Mack,* 112 F.2d 290, 291 (2d Cir. 1940); *Herrera v. United States,* 208 F.2d 215, 218 n. 4 (9th Cir., 1953), *cert. den.*, 347 U.S. 927 (1954).

Thus § 274(a)(3) demonstrates no more than Congressional silence regarding a prohibition of knowing employment of illegal aliens. It does not express a Congressional intent to preempt the states from enacting such a prohibition with the degree of specificity that this Court's decisions require for an expression of such intent, *supra,* pp. 19-21; furthermore, as the next section of this brief will demonstrate, Labor Code § 2805 does not conflict with § 274(a)(3), nor any other federal law but in fact furthers the achievement of the purposes of federal law.

C. Labor Code §2805 Furthers the Accomplishment of §274(a)(3) And Other Relevant Federal Law.

Section 274 prohibits the entry of aliens who have not been lawfully admitted into the United States. There are several other such sections (see § § 101, 214, 271-80, 8 U.S.C. § § 1101, 1184, 1321-30) all designed

to achieve the same end: the exclusion of persons not lawfully admitted into the United States. When an alien is not entitled *to be in* the United States, by definition, such alien is not entitled *to work* in the United States. When a state law such as Labor Code § 2805 prohibits the knowing employment of an illegal alien, the broader purposes of federal law, the exclusion of illegal aliens, is clearly furthered by such state legislation.

The exclusion of illegal aliens is not the ultimate purpose of federal law. The ultimate purpose is "to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market. . . ." Sen. Rpt. No. 748, 89th Cong., 1st Sess., p. 10 (1965). To fulfill this purpose, the 1952 Act created an immigration system of "preferential admissions based upon the existence of a close family relationship with United States citizens or permanent resident aliens, *and upon the advantage to the United States of the special talents and skills of the* immigrant." *Ibid.* This recent immigration legislation, just as such earlier legislation, was enacted principally "to protect American labor against the influx of foreign labor." *Karnuth v. United States*, 279 U.S. 231, 243 (1929).

Under the INA, aliens are authorized to *temporarily* reside (and work) in the United States *only* "if unemployed persons capable of performing such service or labor cannot be found in this country." § 101(a)(15)(H)(ii), 8 U.S.C. § 1101(a)(15)(H)(ii). Aliens are authorized to *permanently* reside (and work) in the United States only if the Secretary of Labor certifies:

> "(A) That there are not sufficient workers in the United States who are able, willing, qualified and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and
>
> (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. . . ." § 212(a)(14), 8 U.S.C. § 1182(a)(14).[24]

In fact, state involvement in this certification procedure is built into the system since in each state it is the state employment agency that "determines availability of domestic workers and the standards of working conditions." Sen. Rpt. No. 748, *supra*, at 15. The intertwined nature of state and federal law is further exemplified by the fact that certification will be denied if the employer in question "has failed to abide by any applicable state or local labor, health or housing laws." 20 CFR § 602.10(e)(3). Similarly, certification will be denied:

> "Where the Immigration and Naturalization Service has notified the Secretary of Labor that the

[24] The regulations of California's Labor Commissioner interpreting Labor Code § 2805, 8 California Admin. Code § § 16209-16209.6, incorporate the same standards used by the Department of Labor in interpreting § 212(a)(14). The Labor Commissioner's regulations define the term, "lawful resident" in Labor Code § 2805 to include any non-citizen who possesses any document issued by the "immigration and Naturalization Service which authorizes him to work." 8 Cal. Admin. Code § 16209. If a prospective employee claims to be a citizen but does not possess documentation proving such status, he may sign a declaration to that effect and thus exonerate an otherwise innocent employer. 8 Cal. Admin. Code § 16209.3.

employer *has had in his employ any foreign worker* who was not lawfully in the United States, *unless* the employer demonstrates that he did not know, had no reasonable grounds to suspect, or could not by reasonable inquiry have ascertained that the alien workers was not lawfully in the U.S. . . ." 20 CFR § 602.10(e)(5) (emphasis added).

If it is assumed for the purposes of argument that the INA is equivocal regarding the preemption of legislation such as Labor Code § 2805, other federal law reveals both an intent to prohibit the employment of illegal aliens and an intent to include and encourage the involvement of the States to employ such means to protect local labor markets. The 93rd Congress amended the Farm Labor Contractor Registration Act of 1963, (FLCRA) § § 5 and 6, to prohibit farm labor contractors from knowingly employing illegal aliens. Pub. L. 93-518, § § 7.10, 88 Stat. 1655, 7 USC § § 2044(b)(6), 2045(f). Section 12, 7 USC § 2050(a), provides civil damage and injunctive remedies. Significantly, and particularly pertinent to the issue before this Court, the FLCRA explicitly authorizes Labor Code § 2805 or similar legislation. Section 15 of the Act, 7 USC § 2051 (§ 12 of the Act was redesignated § 15 by the 1974 amendments, Pub. L. 93-518, § 14) states that the provisions of the Act "are *intended to supplement State action* and [that] compliance with [it] shall not excuse anyone from compliance with appropriate State law and regulation." (Emphasis added.) Labor Code § 2805 is just such an "appropriate State law" because it prohibits employment of illegal aliens as do § § 5 and 6 of FLCRA, as amended. At a minimum, even if it could be successfully argued that

the INA preempts state legislative efforts to control employment of illegal aliens, the more recent expression of Congressional intent embodied in the FLCRA is clearly controlling simply because it is a more recent expression of intent.

In contrast to the INA, the purpose of Labor Code § 2805 is neither to establish an independent definition of the immigration status of aliens nor to impose any burdens upon persons lawfully admitted to the United States. The state statute does not define who may enter the United States or upon what terms, neither does it impose burdens on those who Congress has permitted to enter the country nor does it vary from the objectives of immigration law and policy. More accurately, Labor Code § 2805 takes federal law as written, applies it to remedy local labor problems and concurrently effectuates the legitimate interest of California in protecting its labor.

Of the three cases of the preemption trilogy, *Merrill Lynch, Pierce Fenner and Smith v. Ware, supra,* is most analogous to the instant case. If this Court scrutinizes § 2805 under the standard utilized in *Ware,* then § 274(a)(3), 8 USC § 1324(a)(3), could preempt § 2805 "only to the extent necessary to protect the achievement of the aims" of the federal legislation. *Id.,* at 127. Section 2805 does not conflict with, but effectuates the purpose of federal immigration law and therefore is not preempted. The focal point is that the state and federal laws, while distinctive in their approach, are harmonious in their objectives. An "analysis [of the two statutes] is to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one ousted.' " *Id.,* 127.

The rule requiring the harmonizing of state statutes with federal legislation has even been applied to such traditional areas of federal law as the treaty making power clause of the U.S. Const., Art. I § 10. *Clark v. Allen*, 331 U.S. 503 (1947). In *Clark* the Court upheld a California statute which determined rights of non-resident aliens to inherit in California according to reciprocal inheritance rights accorded United States citizens. This Court held that since the statute had an incidental or indirect effect in foreign countries the statute would not be preempted. *Id.*, at 517.

CONCLUSION

Long-standing doctrine validates Labor Code § 2805. Measuring the California statute against the scheme of Congressional regulation of aliens makes it apparent that California's prohibition is not inconsistent with the purposes of Congress and does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Consideration of pertinent federal law repudiates any finding of conflict between Labor Code § 2805 and federal law. Not only does the state statute harmonize with and effectuate the broad purpose of the federal immigration and related labor laws, but the regulations of California's Labor Commissioner incorporate the same standards used by the Federal Government to determine when a foreign worker may be permitted to work in the United States. Moreover, federal law other than immigration law indicates a congressional desire to invite state assistance in controlling the influx of illegal aliens in the interests of the domestic labor force.

Thus, California Labor Code § 2805 does not infringe on congressional legislation in the area of immigration law; on the contrary, it furthers the purposes of federal legislation, and thus is not unconstitutional on grounds of preemption. For the foregoing reasons the judgment of the California Court of Appeal should be reversed.

Respectfully submitted,

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APPENDIX

1. U.S. Const. Art. I § 8, cl. 8:

Patents and Copyrights

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

2. U.S. Const. Art. I § 10, cl. 1:

Powers Prohibited, Absolutely

1. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

3. 7 U.S.C. § 2044(b)(6):

Refusal to Issue certificate suspension; revocation; refusal to renew

(b) Upon notice and hearing in accordance with regulations prescribed by him, the Secretary may refuse to issue, and may suspend, revoke, or refuse to renew a certificate of registration to any farm labor contractor if he finds that such contractor–

(6) has recruited, employed, or utilized, with knowledge, the services of any person, who is an alien not lawfully admitted for permanent residence, or who has not been authorized by the Attorney General to accept employment; . . .

4. 7 U.S.C. § 2045(f):

Every farm labor contractor shall–

"(f) refrain from recruiting, employing, or utilizing, with knowledge, the services of any

person, who is an alien not lawfully admitted for permanent residence or who has not been authorized by the Attorney General to accept employment; . . .

5. 7 U.S.C. § 2051:

This Chapter and the provisions contained herein are intended to supplement State action and compliance with this Chapter shall not excuse anyone from compliance with appropriate State law and regulation.

6. 8 U.S.C. § 1101(a)(15)(H):

15) The term "immigrant" means every alien except an alien who within one of the following classes of nonimmigrant aliens–

(H) an alien having a residence in a foreign country which he has no intention of abandoning (i) who is of distinguished merit and ability and who is coming temporarily to the United States to perform services of an exceptional nature requiring such merit and ability; or (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country; or (iii) who is coming temporarily to the United States as a trainee; and the aliens spouse and minor children of any such alien specified in this paragraph if accompanying him or following to join him.

7. 8 U.S.C. § 1182(a)(14):

§ 1182. Excludable aliens–General Classes

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or

unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 1101(a)(27)(A) of this title (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in sections 1153(a)(3) and 1153(a)(6) of this title, and to nonpreference immigrant aliens described in section 1153(a)(8) of this title; . . .

8. 8 U.S.C. § 1324(a)(3):

§ 1324. Bringing in and harboring certain aliens; persons liable; authority to arrest

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who–

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation. . .

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall

be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however*, That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

9. 20 C.F.R. § 602.10(e):

Certification and Use of Temporary Foreign Labor for Agricultural, and Logging Employment
§ 602.10 The certification processes.

(e) Certifications will be denied in whole or in part if the findings set forth in paragraph (d) of this section cannot be made or:

(1) Where the employer has been found to have failed without good cause to comply with employment contracts with United States or foreign agricultural or logging workers;

(2) Where the admission of the foreign workers would result in violation of policies of the U.S. Department of Labor governing the referral of workers to jobs involved in strikes or other labor disputes (see § 602.2(b));

(3) Where the employer has failed to comply with any applicable requirements of the foreign government whose nationals are involved; or has failed to abide by any applicable State or local labor, health or housing laws;

* * * *

(5) Where the Immigration and Naturalization Service has notified the Secretary of Labor that the employer has had in his employ any foreign worker who was not lawfully in the United States, unless the employer demonstrates that he did not know, had no reasonable grounds to suspect, or

could not by reasonable inquiry have ascertained that the alien worker was not lawfully in the United States.

10. California Labor Code § 2805:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon violation of subdivision (a)."

Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 74-882

LEONOR ALBERTI DE CANAS and
MIGUEL CANAS, *Petitioners,*

vs.

ANTHONY G. BICA and JUAN SILVA, *Respondents.*

On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF RESPONDENTS

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Subject Index

	Page
Question presented	1
Statement of the case	1
Summary of argument	2
Argument	2
States cannot legislate in areas which interfere with the foreign affairs of the United States or which affect the federal scheme of immigration and naturalization	2
A. Foreign affairs and immigration and naturalization are areas in which there is such an overpowering federal interest that states are foreclosed from intrusion	2
B. Even assuming that states could legislate in the field of immigration and naturalization absent federal legislation, the Immigration and Nationality Act of 1952, as amended in 1965, effectively precludes any state legislation	6
C. Section 2805 of the California Labor Code is unconstitutional because it is in direct conflict with the Immigration and Nationality Act of 1952, as amended in 1965	14
Conclusion	24

Index to Appendix

	Page
1. Section 2805, California Labor Code	i
2. 8 USC 1101	i
3. 8 USC 1103	iii
4. 8 USC 1182(a) (14) (1952-1965)	v
5. 8 USC 1182(a) (14) (1965-present)	v
6. 8 USC 1182(d)	vi
7. 8 USC 1251	vi
8. 8 USC 1324	vii
9. 29 CFR § 60.3	viii
10. H.R. 8713 Sec. 2	ix

Table of Authorities Cited

Cases

	Pages
Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973)	23
Chae Chan Ping v. U.S. 130 U.S. 581 (1889)	3, 21, 23
Charleston & W. C. R. Co. v. Varnville Furniture Co., 237 U.S. 596 (1914)	9
Chy Lung v. Freeman, 92 U.S. 75 (1875)	3, 21
Cooley v. Board of Port Wardens, 12 How. 299	7
Ekiu v. U.S., 142 U.S. 651 (1892)	4, 21
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132	7
Godoy v. Rosenberg, 415 F.2d 1266 (9th Cir. 1969)	11
Goldstein v. California, 412 U.S. 546 (1973)	20, 21, 22
Graham v. Richardson, 403 U.S. 365 (1971)	5, 21
Henderson v. Mayor of New York, 92 U.S. 259 (1875)	3, 14, 21
Hines v. Davidowitz, 312 U.S. 52 (1940)	5, 14, 15, 21, 23
Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)	21, 22
Kolovrat v. Oregon, 366 U.S. 187 (1961)	5, 21
Lee Fook Chuey v. Immigration and Naturalization Service, 439 F.2d 244 (9th Cir. 1971)	11
Merrill Lynch, Pierce, Fenner and Smith v. Ware, 414 U.S. 117 (1973)	21, 22
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	23
Muslemi v. Immigration and Naturalization Service, 408 F.2d 1196 (9th Cir. 1969)	11
New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973)	20, 21, 22
Pennsylvania v. Nelson, 350 U.S. 497 (1955)	7, 8, 14, 21
Perez v. Campbell, 402 U.S. 637 (1971)	23
San Diego Building Trades Council v. Garmon, 359 U.S. 236	7
Smith v. Turner, 48 U.S. 283 (1849)	3
Takahashi v. Fish & Game Commissioner of California, 334 U.S. 410 (1948)	21
Truax v. Raich, 239 U.S. 33 (1915)	5, 6, 21

	Page
United States v. Evans, 333 U.S. 483 (1948)	16
United States v. Gostavo Osuna Picos, 443 F.2d 907 (9th Cir. 1971)	11
U.S. v. Pink, 315 U.S. 203 (1942)	5
Vitale v. Immigration and Naturalization Service, 443 F.2d 907 (9th Cir. 1971)	11
Zschernig v. Miller, 389 U.S. 429 (1968)	5, 14, 21

Codes

Labor Code, Section 2805 ..... 1, 2, 4, 5, 6, 8, 13, 14, 15, 16, 20, 24

Constitutions

United States Constitution:	
Art. I, Sec. 8	3
Art. I, Sec. 8, clause 4	2
Art. I, Sec. 9	3
Art. VI.	3

House Reports

No. 982	18
No. 982, Sec. 2	18
No. 1365, pp. 1653-1655	6
No. 8713, pp. 3, 4, 5	18

Statutes

Farm Labor Contractor Registration Act of 1963	20
Immigration Act of 1917	16
Immigration and Nationality Act of 1952:	
Section 212(a)(14)	11, 12
8 USC:	
Sections 1101 et seq.	8
Section 1101(a)(15)(A)	9

	Pages
Section 1101(a)(15)(H)(ii)	16, 17
Section 1103	7
Section 1182(a)(14)	15, 17, 18
Section 1182(d)	13
Section 1182(d)(5)	13
Section 1251	11
Section 1251(f)	11
Section 1322(a)	18
Section 1324(a)	2, 16, 17, 18

Texts

The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 637	5
1 Gordon and Rosenfield, Immigration Law and Procedure, pp. 1-27	3
U.S. Code, Cong. & Admin. News (1952):	
Page 276	8
Pages 1653-1755	6, 8, 16
U.S. Code, Cong. & Admin. News (1955):	
Page 3344, Sec. 18	18
U.S. Code, Cong. & Admin. News (1965):	
Page 3329	17
Page 3333	17
Page 3334	17

Other Authorities

29 C.F.R.:	
Section 60.3	13
Section 60.3(a)	12
Section 60.3(e)(2)	13
Section 60.6	12, 13
Section 60.6(i)	12
Section 60.6(j)	12
Section 60.6(i)(2)(i)	12
Section 602.10(e)(3)	13
33 Fed. Reg. No. 176, p. 12808	12
36 Fed. Reg. No. 24, p. 2464	12

In the Supreme Court
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LEONOR ALBERTI DE CANAS and
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On Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

BRIEF OF RESPONDENTS

QUESTION PRESENTED

Is Section 2805 of the California Labor Code an unconstitutional attempt to encroach upon the Federal scheme of immigration and foreign affairs?

STATEMENT OF THE CASE

Petitioner sought injunctive relief and damages pursuant to Section 2805, California Labor Code. A demurrer without leave to amend was sustained on February 14, 1973. The Court of Appeals, Second

Appellate District, State of California, affirmed on July 26, 1973. Petition for hearing by the California Supreme Court was denied on October 24, 1974. The United States Supreme Court granted the petition for a Writ of Certiorari on June 23, 1975.

SUMMARY OF ARGUMENT

States cannot legislate in the field of immigration and naturalization, even absent Congressional legislation. Immigration is a field which is reserved to the Federal government. The Federal government has completely occupied this field by passage of the Immigration and Nationality Act of 1952, as amended in 1965. Section 2805 of the California Labor Code is in direct conflict with 8 USC §1324(a), Immigration and Nationality Act of 1952, as amended in 1965.

ARGUMENT

STATES CANNOT LEGISLATE IN AREAS WHICH INTERFERE WITH THE FOREIGN AFFAIRS OF THE UNITED STATES OR WHICH AFFECT THE FEDERAL SCHEME OF IMMIGRATION AND NATURALIZATION.

A. Foreign affairs and Immigration and Naturalization are areas in which there is such an overpowering Federal interest that states are foreclosed from intrusion.

The United States Constitution provides, in Article I, Section 8, clause 4:

> "The Congress shall have the Power . . . to establish a uniform rule of Naturalization . . ."

This power is exclusive.

There is no direct mandate in the United States Constitution dealing with the power to regulate immigration. The federal government did not adopt immigration restrictions for its first 100 years. However, whenever states attempted to control immigration, their attempts were struck down under the theory that the regulation of immigration concerned foreign commerce and this was an area exclusively that of the federal government. *The Passenger Cases (Smith v. Turner)* 48 U.S. 283, (1849); *Henderson v. Mayor of New York,* 92 U.S. 259, (1875); *Chy Lung v. Freeman,* 92 U.S. 75, (1875); Gordon and Rosenfield, Immigration Law and Procedure, Vol. 1, pages 1-27.

In subsequent decisions this Court enlarged the scope of federal power in this area, and stated that the power to regulate immigration was implied from two sources. The first source of implied power is from the specific directives in the Constitution to regulate foreign commerce,[1] declare war,[2] make treaties,[3] establish a uniform rule of Naturalization,[4] prohibit the importation of persons,[5] and to make all necessary and proper laws.[6] The second source of implied powers to regulate immigration is as an incident of national sovereignty without any specific grant in the Constitution. *Chae Chan Ping v. U.S.,* 130 U.S. 581 (1889);

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[1] Article I, § 8.
[2] Article I, § 8.
[3] Article VI.
[4] Article I, § 8.
[5] Article I, § 9.
[6] Article I, § 8.

Ekiu v. U.S., 142 U.S. 651 (1892). In *Ekiu v. U.S.*, the Court stated at page 659:

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent sovereignty, and essential to self preservation to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

Congress and the Federal government are not unaware of the problem of the illegal alien.[7] Petitioner's brief, pages 8-14, depicts the magnitude of the problem. The ultimate objective of 2805 of the Labor Code[8] is

[7]It should be noted that 2805 of the Labor Code deals with "aliens not entitled to lawful residence if such employment would have an adverse effect on lawful resident workers." Petitioner has attempted to reduce this to "illegal aliens", which of course it is not as will be shown later. While the issue is not before this court now, 2805 of the Labor Code is also probably unconstitutional on Due Process grounds, i.e., it is a criminal statute which is so vague that an ordinary man will not know how to conform to its prohibitions. How is an employer to determine lawful residence? When does such employment have an adverse effect—on a daily, weekly, monthly basis? If there is a labor shortage in Northern California, are employers there allowed to hire aliens not entitled to lawful residence, while those in Southern California are not? If a particular industry has a labor shortage which cannot be filled by the domestic labor market, may those employers hire aliens not entitled to lawful residence?

[8]Section 2805 of the California Labor Code reads as follows:

"(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

"(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.

"(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

to expel all "aliens not entitled to lawful residence" from California. They will migrate to the other states of the Union or to the Republic of Mexico or Canada.[9] This amounts to a regulation of immigration and is not permitted by the individual states. It will also cause severe problems with foreign governments (particularly Mexico) concerned about the treatment of their nationals inside this country.

This Court has consistently held that individual states may not interfer with the Federal Government's foreign affairs and its regulation of aliens. *Hines v. Davidowitz,* 312 U.S. 52, (1940), *U.S. v. Pink,* 315 U.S. 203 (1942), *Kolovrat v. Oregon,* 366 U.S. 187 (1961), *Zschernig v. Miller,* 389 U.S. 429 (1968), *Graham v. Richardson,* 403 U.S. 365 (1971).

One commentator suggests that the Federal interest in foreign affairs is so strong that it forecloses any recognition of corresponding state interests. Note: *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court,* 75 Colum. L. Rev. 637.

This Court in *Truax v. Raich,* 239 U.S. 33, (1915) held that an Arizona law, which effectively deterred interstate migration of aliens by imposing a substantial limitation on employment opportunities interfered with the power of the federal government to

[9]It is also possible that those terminated would seek general welfare assistance. If such assistance were denied, they would again be forced to migrate to Mexico, Canada, or throughout the other states of the Nation. If the assistance were obtained, then 2805 of the Labor Code would be subverting California's legitimate interest in promoting self-reliance and assuring that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need.

admit persons to this country under acts of Congress. At page 42, 239 U.S., the Court states:

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government."

Labor Code Section 2805 likewise seeks to control immigration into the State of California and the migration of aliens interstate by seeking to abolish their employment opportunities.[10]

B. Even assuming that states could legislate in the field of immigration and naturalization absent federal legislation, the Immigration and Nationality Act of 1952, as amended in 1965, effectively precludes any state legislation.

Congress specifically intended to completely occupy the field of Immigration. This includes the right to exclude aliens at the border and to expel such aliens as it desires from within its borders and in which ways it wants the aliens expelled. U.S. Code, Cong. & Admin. News, 1952, pages 1653-1755. The House Report (No. 1365) discusses the power of Congress at pages 1653-1655 and contains the following:

> "The expulsion of aliens is a *sovereign power* necessary to the safety of the country, to be regulated by the *legislative* department." (Emphasis added).

[10]Petitioners may contend that the situation is unlike *Truax v. Raich* because Section 2805 only deals with aliens not entitled to lawful residence while *Truax* applied to aliens otherwise lawfully admitted into the United States. Analytically this is incorrect, because there may be some time, either at the present or in the future, when employment of aliens not entitled to lawful residence would not have an adverse effect on lawful resident workers. If that situation arose, then it would not be a violation of Section 2805 to hire an alien not entitled to lawful residence and California would actually be encouraging the entry of aliens not entitled to lawful residence. This again amounts to an attempt to control immigration.

The Act itself provides that the Attorney General shall be charged with the administration and enforcement of the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as the Act or other laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State or diplomatic or counsular officers. 8 USC §1103.

This is not a case involving historic police powers of the States. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132. It is a subject by its own very nature admitting only of national supervision. *Cooley v. Board of Port Wardens,* 12 How. 299, 319-320. It is also a subject demanding exclusive federal regulation in order to achieve uniformity vital to national interests. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241-244.

Pennsylvania v. Nelson, 350 U.S. 497 (1955), declared the test to be used to determine whether the federal government has so occupied a field that a state cannot legislate in that area.

> "First, the scheme of federal regulation is so persuasive as to make reasonable the inference that Congress left no room for the states to supplant it." Page 502.
>
> "Second, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude en-

forcement of state laws on the same subject." Page 504.

"Third, enforcement of State Sedition Act presents a serious danger of conflict with the administration of the federal program." Page 505.

In *Pennsylvania v. Nelson,* supra, the State of Pennsylvania had enacted the Pennsylvania Sedition Act. This Court held that the federal government by enacting the Smith Act of 1940, and amending it in 1948, invalidated the state law under the doctrine of federal suppression.

It must be conceded that Congress has enacted a comprehensive scheme for immigration and nationality. The Immigration and Nationality Act of 1952 is found at 8 USC § 1101 et seq. It was passed over President Truman's veto on January 27, 1952. U.S. Code, Cong. & Admin. News, 1952, page 276. The volume and subject matter alone indicate the comprehensiveness of the Act. Congress thought that it was enacting a comprehensive law as the committee states at page 1653 U.S. Code, Cong. & Admin. News, 1952:

"Purpose of the Bill

The purpose of the bill is to enact a comprehensive, revised immigration, naturalization and nationality code."

By virtue of the comprehensive legislation in this area, the State of California is precluded from also legislating. Clearly the tests of *Nelson* are met, and Section 2805 must fall. First, the scheme of federal regulation is so pervasive as to make reasonable the

inference that Congress left no room for the states to supplement it. Second, as was shown previously in Part A of this brief, the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of same laws on the same subject. Third, the enforcement of the state act presents a serious danger of conflict with the administration of the federal program as it could expel masses of aliens not entitled to lawful residence to other states and across international borders. As Justice Holmes said in *Charleston & W. C. R. Co. v. Varnville Furniture Co.,* 237 U.S. 596 (1914):

"When Congress has taken a particular subject matter in hand, coincidence is as ineffective as opposition, and the state law is not to be declared a help because it attempts to go further than Congress has seen fit to go."

In addition, there are statutory provisions and administrative decisions which compel the result that this field has been completely occupied.

There are many statutory classifications of aliens who are permitted employment but are not entitled to lawful residence. Among these are:

8 USC 1101(a)(15)(A) An ambassador, public minister, or career diplomat who has been accredited by a foreign government recognized de jure by the United States and the members of the alien's immediate family may work and may employ necessary personal employees.

Subsection (iii) recognizes the right to work of attendants, servants, personal employees and members

of the immediate families and employees who have a non-immigrant status under Section (A) above.

Subdivision (B) thereof, an alien having a residence in a foreign country which he has no intention of abandoning, and who is visiting the United States temporarily for business may be employed in the United States without having residence here.

Subdivision (D) thereof, an alien crewman serving on board a vessel or aircraft is permitted employment.

Subdivision (E) thereof, an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of Commerce and Navigation between the United States and a foreign state of which he is a national; or (i) solely to carry out substantial trade principally between the United States and the foreign State of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested or of an enterprise of which he is actively in the process of investing, substantial amounts of capital. These are properly known as treaty traders and treaty investors.

Subdivision (F)(i) permits an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study may work while pursuing his course of study, with the approval of the District Director of Immigration.

Subdivision (L) permits the intercompany transfer of aliens not entitled to lawful residence in order to continue to render his services to the same employer.

Also, there is a long line of decisions, beginning with *Muslemi v. Immigration and Naturalization Service,* 408 F.2d 1196 (9th Cir. 1969) which provides for relief from deportation of aliens who are in the United States fraudulently. *Godoy v. Rosenberg,* 415 F.2d 1266 (9th Cir. 1969); *Lee Fook Chuey v. Immigration and Naturalization Service,* 439 F.2d 244 (9th Cir. 1971); *United States v. Gostavo Osuna Picos,* 443 F.2d 907 (9th Cir. 1971); *Vitale v. Immigration and Naturalization Service,* 443 F.2d 907 (9th Cir. 1971). These cases all involve aliens who were relieved from deportation pursuant to 8 USC 1251(f)[11] and are eligible for employment.

The above are just a few of the people not entitled to lawful residence who are recognized as being entitled to employment.

Petitioner's contention that the Federal government is inviting the states to cooperate in a plan to punish employers for knowingly hiring illegal aliens is contradicted by actions taken by the U.S. Labor Department itself. In determining which employers would be permitted to secure labor certifications pursuant to 212(a)(14) (determination of adverse effect on domestic labor), the Labor Department adopted Regu-

[11]8 USC § 1251. Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry.

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

lation 60.6(i) and (j) of 29 CFR on September 10, 1968. 33 Fed. Reg. No. 176, p. 12808.

In summary, 29 CFR 60.6(i)(2)(i)[12] provided that an employer would be denied a labor certification if he used an agent (or agency) who referred an illegal alien for employment within the previous 3 years. 29 CFR 60.6(j)[13] provided that a labor certification would be denied if an employer knowingly hired an illegal alien (alien who entered the United States without inspection) within three years.

On February 4, 1971, the U.S. Department of Labor withdrew both of these regulations. 36 Fed. Reg. No. 24, p. 2464. They have not been replaced with anything similar. The conclusion is inescapable. The Federal government, through the executive branch, is not going

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[12]29 CFR § 60.6 Matters to be considered.

Prospective employment offered in accordance with § 60.3(a) will be deemed to adversely affect "wages" or "working conditions" of American workers within the meaning of section 212(a)(14) of the Act unless it appears: • • •

(i) That such employment is not procured through an agent (or agency) which has within 3 years prior to the offer (1) concealed the extent of his participation in the placement of an alien, or (2) referred to employment an alien who (i) entered the United States without inspection, or (ii) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such agent demonstrates that he did not know, had no reasonable grounds to know, or could not be reasonable inquiry have ascertained knowledge of these circumstances.

[13]29 CFR § 60.6.

(j) That such employment is not with an employer who has within three years prior to the offer hired an alien who (1) entered the United States without inspection, or (2) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such employer demonstrates that he did not know, had no reasonable grounds to know, or could not by reasonable inquiry have ascertained knowledge of these circumstances.

to regulate immigration and foreign affairs by penalizing employers for knowingly hiring illegal aliens.

This attitude is expressed in 29 CFR 60.3(e)(2)[14] which states that an employer is not subject to a denial of certification on the ground of employing an alien who works without authorization.

Petitioner's reliance on 29 CFR 602.10(e)(3) is not well placed. That regulation applies only to employment in the Agricultural and Logging industry. 2805 of the Labor Code applies to all employment, as does 29 CFR 60.6.

A final example of the need for an exclusive federal regulatory scheme in this field is the status of approximately 130,000 South Viet Nam refugees in this country. They were admitted under 8 USC §1182(d)(5) of the Act which permits the Attorney General to grant entry on a parole status to aliens.[15] After

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[14]29 CFR § 60.3. Requests for certification.

(e) Forms: Application for Alien Employment Certification.

(2) Job Offer for Alien Employment—MA 7-50B (formerly ES-575B). This form provides for a description of the alien's prospective employment in the United States. It is to be completed by a prospective employer. (Because of changes in these regulations effectuated since the issuance of Form MA 7-50B, the note printed between items 3 and 4 of that form is modified to the extent that an employer is not subject to a denial of certification on the ground of employing an alien who works without authorization.

[15]USC § 1182(d)

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

two years, these aliens will be allowed to apply for an adjustment of status to an immigrant lawfully admitted for permanent residence. During this time, they are not entitled to lawful residence and would be unable to secure employment in California if Labor Code 2805 were enforced. Such a result would completely frustrate the Federal government's purpose in bringing the refugees to this country.

C. Section 2805 of the California Labor Code is unconstitutional because it is in direct conflict with the Immigration and Nationality Act of 1952, as amended in 1965.

Section 2805 should fall because it is an attempt to regulate immigration, *Henderson v. Mayor of New York,* supra, interfers with the foreign affairs of the Federal government, *Zschernig v. Miller,* supra, and because Congress has completely occupied the field of immigration, *Pennsylvania v. Nelson,* supra.

It must also fall under the theory of *Hines v. Davidowitz,* 312 U.S. 52, (1940). In *Hines,* supra, the State of Pennsylvania passed an alien registration law which required all aliens to register and carry alien identification cards. The federal government, in 1940, passed the Alien Registration Act. Davidowitz, an alien, filed an action to declare the Pennsylvania Act unconstitutional. He advanced two theories, summarized at 312 U.S. 59. First, the Pennsylvania Act encroached on a field reserved for the federal government. Second, it was a denial of equal protection. Justice Black, writing for the majority, restricted the ruling to: "Whether, by adoption of a comprehensive, integrated scheme for regulation of aliens, Congress

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has precluded state action." This was resolved in favor of Davidowitz, *Hines v. Davidowitz,* supra, page 62 and 63:

> "That the supremacy of national power in the general field of foreign affairs, including power of immigration, naturalization, and deportation, is made clear by the Constitution, was pointed out by the authors of the Federalist in 1787 (fn omitted). When the national government, by treaty or statute has established rules and regulations touching the rights, privileges, obligations, or burdens of aliens as such, the treaty or the statute is the supreme law of the land. No state can add to or take from the force in effect of such treaty or statute. . . ."

The opinion continues, at page 66 and 67:

> "And where the Federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations (fn omitted)."

All that need be added to the present case is the substitution in the above statement of the word "employment" for the word "registration."

Petitioner maintains that Section 2805 is consistent with the Federal scheme of immigration. As such, Petitioner states that Section 2805 reinforces the policy expressed in 8 USC § 1182(a)(14), (applicants for

permanent admission), and 8 USC § 1101(a)(15)(H)(ii) (issuing of labor certificates to temporary workers who are non-immigrants and perform labor if unemployed workers in this country cannot be found).

It is obvious, however, that Section 2805 has nothing to do with either temporary employment of non-immigrants without visas or permanent admission of immigrants. It is directed solely at employers of "aliens not entitled to lawful residence." This area has also been specifically dealt with by Congress in 8 USC § 1324(a) which provides a comprehensive scheme for defining the crimes of transporting or harboring, or inducing entry of any alien not lawfully entitled to enter or reside within the United States. The statute itself emphasized that employment was not a violation of the Act. *"Provided, however,* etc."

The legislative history is not silent on this matter either. U.S. Code, Cong. & Admin. News, 1952, page 1724:

> "The committee wishes to state that employment (including the usual and normal practice incident to employment) shall not be deemed to constitute harboring, and, with this reservation, the committee strongly recommends the enactment of Section 274 [1324(a)] as amended."

Section 1324(a) was the subject of concern when the Immigration and Nationality Act of 1952 was under consideration. This was necessitated by the decision in *United States v. Evans,* 333 U.S. 483 (1948) which held that the penalty provisions under the Immigration Act of 1917 were inadequate to provide

a penalty for concealing or harboring aliens unlawfully in the United States. Section 1324(a) was rewritten so that concealing or harboring were violations of the Act. It is thus clear that Congress addressed itself squarely on the issue of employment of aliens not entitled to lawful residence and declared that it was not unlawful.

Petitioner places much reliance on the amendments to the Act which were made in 1965. However, those amendments address themselves to the issuing of visas to aliens seeking employment. 8 USC § 1182(a)(14) was amended to put the burden on the alien to establish that there were not sufficient workers in the United States at the alien's destination who are able, willing and qualified to perform the skilled or unskilled labor and that his employment would not adversely affect wages and working conditions of U.S. citizens similarly employed. U.S. Code, Cong. & Admin. News, 1965, pages 3333 and 3334. At page 3329 the Committee's report, Item No. 7 states:

> "7. Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market are strengthened."

This, of course, has nothing to do with employment of aliens not entitled to lawful residence. Had the petitioner charged that the Secretary of State was issuing visas contrary to the provisions of 8 USC § 1182(a)(14) or labor certificates pursuant to § 1101(a)(15)(H)(ii) then he could seek relief in Federal District Court.

Petitioner would have the Court believe that by amending 8 USC § 1182(a)(14), Congress was inviting the individual states to pass laws which would restrict the employment of aliens not entitled to lawful residence in the United States. There is a major problem with such a theory. Congress would have had to address itself to the penalty provision chapter of the Immigration Title of the Act rather than the admission qualifications chapter. It then would have had to delete the employment exemption and/or create a new crime, namely that of employing aliens not entitled to lawful residence. It did neither of these. It did examine the penalty provision chapter and amended 1322(a) to bring it into conformity with § 1182(a)(14). U.S. Code, Cong. & Admin. News, 1955, page 3344 (Section 18).

Congress is not ignorant of the problem of employment of aliens not entitled to lawful residence. On May 3, 1973, the House of Representatives passed H.R. 982.[16] The section of concern for this case of H.R. 982 is Section 2. The bill amends 8 USC § 1324 (a) to provide a penalty for knowingly employing any alien not lawfully admitted to the United States for permanent residence. It involves a three-step procedure in which an employer is first cited, then fined civilly, and finally charged with a misdemeanor on the third offense. (H.R. 8713, pages 3, 4 and 5).

[16]H.R. 982 has been reintroduced in this session of Congress again as H.R. 982. It was re-numbered H.R. 8713 and passed out of the Judiciary Committee on July 30, 1975.

Some relevant portions of the committee (judiciary) report (93-108 to accompany H.R. 982, 93rd Congress, 1st Session) include:

> "Since under present law there is no prohibition on the employment of illegal aliens . . ." page 6.
>
> "The original legislation before the Committee (H.R. 2328, 92nd Congress, which was introduced at the request of the administration), would have provided a $1,000 fine and/or one year imprisonment for a first violation. The Committee reviewed this approach as too severe, and recognized the possibility of employment discrimination if criminal penalties were initially imposed. Consequently the Committee rejected this approach and instead, substituted the graduated three-step procedure for the imposition of sanctions." Pages 12 and 13.
>
> "Not only is the employment of unlawful aliens not illegal under present law, but such employment actually appeared to be condoned by the existing proviso in Section 274(a)(4) [1324 (a)(4)] that employment shall not be deemed to constitute the harboring of illegal aliens." Page 15.
>
> "Moreover, despite the fact that eight out of ten illegal aliens apprehended are Mexican natives, the problem is no longer restricted to the agricultural and border area of the Southwestern United States. Increasingly, illegal aliens travel, or arrange to be transported, to all of the metropolitan areas in the United States, where they can obtain higher-paying jobs in industry and, at the same time, more easily escape detection by Immigration authorities." Page 5.

It is clear that Congress has carefully considered the problem of employment of aliens not entitled to lawful residence. It is also clear that Congress has made the express determination that such employment is not unlawful. It may decide to alter this position in the future, but that is a matter strictly within its jurisdiction, and not that of the individual States. Section 2805 of the Labor Code is not an aid to the federal scheme, but is in direct conflict with it and is invalid.

Petitioner's statement that the passage of the amendments to the Farm Labor Contractor Registration Act of 1963 is an expression of Congressional intent to control the employment of illegal aliens is in error. 2805 of the Labor Code applies to all employers in the State of California. The Farm Labor Contractor Registration Act applies only to farm labor contractors. Congress is well aware that employment of aliens not entitled to lawful residence is permitted. By restricting the prohibition of employing aliens not entitled to lawful residence to farm labor contractors, it is affirming its long-held position that all other employers are not to be punished for the employment of aliens not entitled to lawful residence.

Recent decisions of this Court must be analyzed to determine whether 2805 of the Labor Code is a valid expression of a state interest or an intrusion into an area taken by the Federal government.

Petitioner's reliance on *Goldstein v. California,* 412 U.S. 546 (1973); *New York State Department of*

Social Services v. Dublino, 413 U.S. 405 (1973); *Merrill Lynch, Pierce, Fenner and Smith v. Ware,* 414 U.S. 117 (1973); and *Kewanee Oil Co. v. Bicron Corp.,* 416 U.S. 470 (1974) are distinguishable on subject matter grounds. *Goldstein v. California,* supra, dealt with the preemptive scope of the copyright clause; *New York State Department of Social Services v. Dublino,* supra, involved the Work Incentive Program of the Social Security Act; *Merrill Lynch, Pierce, Fenner and Smith v. Ware, supra,* dealt with an arbitration rule promulgated by the New York Stock Exchange; *Kewanee Oil Co. v. Bicron Corp.,* supra, was concerned with federal patent laws and Ohio's trade secret laws.

None of the above cases concerned aliens, immigration, or foreign affairs. Indeed, this Court has consistently refused to let the individual states operate in these areas. *Graham v. Richardson,* supra; *Zschernig v. Miller,* supra, *Kolovrat v. Oregon,* supra; *Pennsylvania v. Nelson,* supra; *Hines v. Davidowitz,* supra; *Takahashi v. Fish & Game Commissioner of California,* 334 U.S. 410 (1948); *Truax v. Raich,* 239 U.S. 33; *Henderson v. Mayor of New York,* supra; *Ekiu v. U.S.,* supra; *Chy Lung v. Freeman,* supra, *Chae Chan Ping v. U.S.,* supra.

The aforementioned cases are also distinguishable on analytical grounds. In *Goldstein v. California,* supra, there was the absence of a federal statute to allow federal copyright protection of recordings, 412 U.S. 546, 552. Also, the subject matter to which the Copyright Clause is addressed may be of purely local

importance and not worthy of national attention. 412 U.S. 546, 558. In *Kewanee Oil Co. v. Bicron,* supra, this court again found the essentially nonuniform character of the appreciation of intellectual achievements in the various states and held that states may hold diverse viewpoints in protecting intellectual property relating to inventions. 416 U.S. 470, 479. The Court found no conflict with the operation of federal laws, and noted that trade secret law and patent law have co-existed in this country for over one hundred years. 416 U.S. 470, 493.

In *Merrill Lynch, Pierce, Fenner & Smith v. Ware,* supra, the Court found that the purpose of the Securities Exchange Act was to insure fair dealing and protect investors from harmful or unfair trading practices. 414 U.S. 117, 130. The arbitration rule in question was found not needed as part of a uniform national regulation and was described as a housekeeping rule which was not necessary for the achievement of the national policy objectives. 414 U.S. 117, 136. In *New York State Department of Social Services v. Dublino,* the Court found no clear intent to supersede state law, 413 U.S. 405, 413; that states have considerable latitude in allocating their AFDC resources, since each state was free to set its own standard of need and determine the level of benefit by the amount of funds it devotes to the program, 413 U.S. 405, 414 (citations omitted). The Court also noted that 21 states had initiated welfare work requirements as a condition of AFDC eligibility when the federal work incentive program was passed by Congress. 413 U.S. 405, 414. The State of New York

and the federal government also had a complementary administrative framework. 413 U.S. 405, 421.

The present case offers none of these factors in opposition to preemption. There is a comprehensive federal act and administrative agency while there are no corresponding state laws or agencies concerning the same subject; there is a clear statement of Congressional intent to totally occupy and preempt the field; and most important, there is an overwhelming need for a uniform national policy in these areas. There is no area which lends itself more to the constitutional doctrine of preemption than regulation of aliens, immigration, and foreign affairs. Other recent decisions of this court have upheld preemption in fields which are national in character. *Perez v. Campbell,* 402 U.S. 637 (1971). Federal Bankruptcy Act preempts motor vehicle responsibility statute; *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971), comprehensive national labor law preempts state court jurisdiction; *Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973), Federal Aviation Agency and Environmental Protection Agency preempt state control of aircraft noise.

If there is one subject which does not lend itself to diverse treatment by the various States, it is that of immigration and foreign affairs. *Hines v. Davidowitz,* supra; *Chae Chan Ping v. U.S.,* supra, at page 606:

> "For local interests, the several States of the Union exists; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

CONCLUSION

In summary, it is respondents' contention that Section 2805 of the California Labor Code is unconstitutional under three separate and distinct theories of preemption.

First, it attempts to regulate immigration and foreign affairs and is unconstitutional because that is a subject matter over which the federal government has exclusive jurisdiction.

Second, assuming arguendo, that the States had concurrent juridiction over immigration and nationality, Section 2805 is unconstitutional because Congress has enacted a comprehensive scheme and left no room for the individual states to legislate.

Third, Congress has addressed itself to the specific area that Section 2805 does, namely penalties for the employment of aliens not entitled to lawful residence. It has expressly stated that such employment is not unlawful. Section 2805 is in direct conflict with this policy and is invalid.

Dated, Berkeley, California,
September 17, 1975.

Respectfully submitted,
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(Appendix Follows)

APPENDIX

Appendix

1. Section 2805 of the California Labor Code reads as follows:

> "(a) No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.
>
> "(b) A person found guilty of violation of subdivision (a) is punishable by a fine of not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00) for each offense.
>
> "(c) The foregoing provisions shall not be a bar to civil action against the employer based upon a violation of subdivision (a)."

2. 8 USC 1101. Definitions

8 USC 1101 (a) (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

(A) (i) an ambassador, public minister, or career diplomatic or consular officer who has been accredited by a foreign government recognized de jure by the United States and who is accepted by the President or by the Secretary of State, and the members of the alien's immediate family;

. . .

(iii) upon a basis of reciprocity, attendants, servants, personal employees, and members of their immediate families, of the officials and employees who have a nonimmigrant status under (i) and (ii) above;

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft;

(E) an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national, and the spouse and children of any such alien if accompanying or following to join him: (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital;

(F) (i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to

enter the United States temporarily and solely for the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designated by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

(L) an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

3. 8 USC 1103. Power and duties of the Attorney General and Commissioner; appointment of Commissioner

(a) The Attorney General shall be charged with the administration and enforcement of this chapter

and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling. He shall have control, direction, and supervision of all employees and of all the files and records of the Service. He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions,[1] and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter. He is authorized, in accordance with the civil-service laws and regulations and chapter 51 and subchapter III of chapter 53 of Title 5, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. He shall have the power and duty to control and guard the boundaries and borders of the United States against the illegal entry of aliens and shall, in his discretion, appoint for that purpose such number of employees of the Service as to him shall appear

necessary and proper. He is authorized to confer or impose upon any employee of the United States, with the consent of the head of the Department or other independent establishment under whose jurisdiction the employee is serving, any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service. He may, with the concurrence of the Secretary of State, establish officers of the Service in foreign countries; and, after consultation with the Secretary of State, he may, whenever in his judgment such action may be necessary to accomplish the purposes of this chapter, detail employees of the Service for duty in foreign countries.

4. 8 USC 1182(a) (14) provided (1952-1965) for the exclusion of admission the following class of aliens: "Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which alien is destined) to perform such skilled or unskilled labor or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed."

5. 8 USC 1182(a) (14) provides (1965-present) for the exclusion of admission the following class of

aliens: "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed . . ."

6. 8 USC 1182(d):

(5) The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

7. 8 USC 1251 Relationship to United States citizen or lawfully admitted alien as affecting deportation for fraudulent entry.

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or child of a United States citizen or of an alien lawfully admitted for permanent residence.

8. 8 USC 1324 "(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; or

(4) willfully or knowingly encourages or induces, or attempts to encourage or induce, either directly or indirectly, the entry into the United States of—any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this act or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection

occurs: *Provided, however,* that for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."

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9. 29 CFR § 60.3 Requests for certification.

(e) Forms: Application for Alien Employment Certification.

(2) Job Offer for Alien Employment—MA 7-50B (formerly ES-575B). This form provides for a description of the alien's prospective employment in the United States. It is to be completed by a prospective employer. (Because of changes in these regulations effectuated since the issuance of form MA 7-50B, the note printed between items 3 and 4 of that form is modified to the exent that an employer is not subject to a denial of certification on the grounds of employing an alien who works without authorization).

29 CFR § 60.6 (1969) Matters to be considered.

Prospective employment offered in accordance with § 60.3(a) will be deemed to adversely affect "wages" or "working conditions" of American workers within the meaning of section 212(a)(14) of the Act unless it appears: * * *

(i) That such employment is not procured through an agent (or agency) which has within 3 years prior to the offer (1) concealed the extent of his participation in the placement of an alien, or (2) referred to

employment an alien who (i) entered the United States without inspection, or (ii) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such agent demonstrates that he did not know, had no reasonable grounds to know, or could not by reasonable inquiry have ascertained knowledge of these circumstances; and

(j) That such employment is not with an employer who has within three years prior to the offer hired an alien who (1) entered the United States without inspection, or (2) was in the United States as a nonimmigrant and whose employment violated his nonimmigrant status, unless such employer demonstrates that he did not know, had no reasonable grounds to know, or could not be reasonable inquiry have ascertained knowledge of these circumstances.

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10. H.R. 8713. SEC. 2. Section 274 of the Immigration and Nationality Act (8 U.S.C. 1324) is amended by deleting the proviso in paragraph 4 of subsection (a) and by redesignating subsection (b) as subsection (e) and adding new subsections (b), (c), and (d) to read as follows:

"(b) (1) It shall be unlawful for any employer or any person acting as an agent for such employer, or any person who, for a fee, refers an alien for employment by such an employer knowingly to employ, continue to employ, or refer for employment any

alien in the United States who has not been lawfully admitted to the United States for permanent residence, unless the employment of such alien is authorized by the Attorney General.

"(2) If, on evidence or information he deems persuasive, the Attorney General, after affording an opportunity to respond to and rebut such evidence or information, reasonably concludes that an employer, or a person acting as an agent for such an employer, or any person who, for a fee, refers an alien for employment by such an employer, employs, continues to employ, or refers for employment any alien in the United States who has not been lawfully admitted for permanent residence, or any alien whose employment has not been authorized by the Attorney General, the Attorney General may serve a citation on the employer, agent, or referrer containing a notification that the alien's employment is not authorized and a warning of the penalties and injunctive remedy set forth in this section. The procedure prescribed by and the provisions of chapter 7 of title 5, United States Code, shall apply to and shall be the sole and exclusive procedure for the judicial review of a citation served by the Attorney General. An action for judicial review of a citation may be filed in the appropriate judicial district not later than sixty days from the date of issuance of the citation.

"(3) If, in a proceeding initiated within two years after the service of such citation, the Attorney General finds that any employer, agent, or referrer upon whom such citation has been served has there-

after violated the provisions of paragraph (1), the Attorney General shall assess a penalty of not more than $500 for each alien in respect to whom any violation of paragraph (1) is found to have occurred.

"(4) A civil penalty shall be assessed by the Attorney General only after the person charged with a violation under paragraph (3) has been given an opportunity for a hearing and the Attorney General has determined that a violation did occur, and the amount of the penalty which is warranted. The hearing shall be of record and conducted before an immigration officer designated by the Attorney General, individually or by regulation, and the proceeding shall be conducted in accordance with the requirements of title 5, section 554, of the United States Code.

"(5) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Attorney General shall file a suit to collect the amount in any appropriate district court of the United States. In any such suit or in any other suit seeking to review the Attorney General's determination, the suit shall be determined solely upon the administrative record upon which the civil penalty was assessed and the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

"(c) Any employer or person who has been assessed a civil penalty under subsection (b) (3) which has become final and thereafter violates subsection (b) (1) shall be guilty of a misdemeanor and upon con-

viction thereof shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both, for each alien in respect to whom any violation of this subsection occurs.

"(d) The district court of the United States shall have jurisdiction to enjoin violations of subsection (b) (1). Such actions may be brought by the Attorney General in any United States district court for a district wherein any act, omission, or transaction constituting the violation occurred, or any such court for the district wherein the defendant is found or transacts business."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-882

Supreme Court, U. S.
FILED
NOV 14 1975
MICHAEL RODAK, JR., CLERK

LEONOR ALBERTI DE CANAS
and MIGUEL CANAS,

Petitioners,

v.

ANTHONY G. BICA
and JUAN SILVA,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

PETITIONERS' RESPONSE TO BRIEF OF RESPONDENT

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1. WHETHER THE FEDERAL GOVERNMENT HAS OCCUPIED THE FIELD OF IMMIGRATION LAW MISCONCEIVES THE ISSUE HERE.

Respondents predicate their attack of § 2805 of the California Labor Code (hereinafter "§ 2805") on the

assumption that the California law is a law to regulate immigration. To the contrary, § 2805 merely uses federal immigration law definitions to effect local labor policy but does not disturb federal determinations concerning who may enter the United States and on what terms and conditions entry may be made. Section 2805 precludes the knowing employment of *only* those persons, defined by federal law and federal administrative practices (see 8 Cal. Admin. Code § 16209), as not authorized to work in the United States.

A previous determination by this Court held that a different California labor statute which precluded wage forfeiture and arbitration was not to be considered a law regulating national securities exchange even though it might actually conflict with ancillary provisions of the Securities Exchange Act, 15 U.S.C. § 78(f). *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 130, 134-136 (1973). Similarly, this Court held that a state trade secret statute which conflicted with various aspects of federal patent law was not invalid because it was not a law regulating patents. *Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 370, 493 (1974). Accordingly, § 2805 cannot be considered a law regulating immigration merely because it makes use of immigration law concepts. In short, because § 2805 does not regulate immigration, the question whether the federal interest in foreign affairs confers on Congress an exclusive power to regulate immigration is not, and need not be, at issue here. Cf. *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum.L.Rev. 623, 637 (1975).

Respondents consistently misinterpret the scope of California Labor Code § 2805 by neglecting to read § 2805 in accordance with the implementing regulations

issued by the California Labor Commissioner. The California Labor Commissioner's regulations under § 2805, Title I, Cal. Admin. Code, Pt. 1, Ch. 8, Art. 1, § 16209-16209.6, totally incorporate federal standards regarding the classification of aliens.[1]

According to the labor regulations, the definition of "lawful resident" under § 2805 includes non-immigrant aliens and any other person lawfully admitted to the United States. Specifically, the regulations define the term "lawful resident" in § 2805 to include any non-citizen who possesses any document issued by the "Immigration and Naturalization Service which authorizes him to work." 8 Cal. Admin. Code § 16209. In the event that a prospective employee claims to be a citizen (or lawfully admitted) but does not possess documentation proving such status, he may sign a declaration to that effect and exonerate, if necessary, an otherwise innocent employer. 8 Cal. Admin. Code § 16209.3. These California regulations thus incorporate the same standards used by the United States Department of Labor.

Consequently, the respondents' objection that § 2805 is vague and overbroad (p.4, Respondents' brief) with regard to the definition of "aliens entitled to lawful residence" is illusory. Intimations that petitioners have "erroneously reduced" the term "aliens not entitled to lawful residence" to "illegal aliens" cannot stand in view of the specific definition articulated by the California Labor Commissioner which, in fact, legitimates petitioners' use of the term "illegal aliens." The

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[1] The Regulations of the California Labor Commission, 8 Cal. Admin. Code, § 16209-16209.6 are reproduced as Appendix "A."

California regulations accept and incorporate federal law defining those aliens not entitled to lawful residence but who are nonetheless entitled to work in the United States. The California Labor Code § 2805 only reaches those not lawfully "present" and not entitled to work according to federal standards.

Accordingly, respondents' efforts to demonstrate that federal classifications of aliens who are permitted employment, pursuant to provisions of 8 U.S.C. § 1101(a) somehow invalidate § 2805 are likewise inappropriate (p.9, Respondents' brief). Section 2805 would not prohibit these legally-authorized aliens from working. Nor would Vietnamese refugees admitted to this country, pursuant to 8 U.S.C. § 1182(d)(5), be barred from employment in California. Any alien legally admitted to the United States and authorized to work by the federal government would not be deprived of the right to work through the exercise of § 2805.

Moreover, respondents' charge that the determination of "adverse effect" under § 2805 would be ambiguous (p.4, f.n.7, Respondents' brief) is invalid. That contention is also refuted by the California Labor Commissioner's reference to the federal standards, which results in California's retention of federal definitions and standards in interpreting the term in California's regulations. 8 Cal. Admin. Code § 16209.6.

In contrast to the Immigration and Nationality Act, the purpose of § 2805 is not to establish an independent definition of the immigration status of aliens, nor to impose any burdens on persons lawfully admitted to the United States. In short, the state statute does not define who may enter the United States or upon what terms. More accurately, § 2805

extends federal law to remedy a local labor problem to effectuate the legitimate interest of California in protecting its labor.

Respondents mischaracterize the test used in *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), as the exclusive test for determination of federal occupation of a field. However, *Pennsylvania v. Nelson, supra,* did involve identical state and federal laws. In *Nelson,* the Court invalidated a state sedition law which operated in tandem with the federal government's Smith Act (itself a sedition law). The Court grounded its decision on a potential conflict involving the possibility of multiple and inconsistent adjudications if both the federal and state statutes were allowed to stand. Hence, absent an indication of congressional intent to occupy the field, the Court took note of the administrative and substantive problems engendered by two identical statutes covering the same conduct. The Court thus resolved the potential conflict between the two systems by enunciating the preemption of the state statute because of the possibility of incompatible adjudications under the two statutes.

The case at bar is distinguishable from *Nelson*. While *Nelson* involved a potential conflict between two systems aimed at regulating identical behavior (sedition), the instant case involves federal and state statutes in two (2) different fields–immigration and labor. Moreover, Congress does not condone the behavior which the California statute prohibits. Therefore, the two statutes do not compete or even potentially conflict. Rather, they operate in different domains. The federal statute is directed toward regulating immigration and the state statute toward regulating employers and

employment. Consequently, the facts of the instant case are totally distinguishable from the *Nelson* case. In sum, because Congress neither condones nor specifically condemns the employment of aliens not entitled to lawful residence (the subject of § 2805), the principle of *potential conflict* between competing federal and state systems has no application here.

Furthermore, the test used in *Pennsylvania v. Nelson* was redefined and narrowed substantially in *Goldstein v. California*, 412 U.S. 543 (1973). In *Goldstein*, it was declared that state law was not to be preempted by federal law unless (1) the state law was "absolutely and totally contradictory and repugnant"; (2) involved a matter "necessarily national in impact"; and (3) subject to a conflict which would "necessarily arise." 412 U.S. at 544. The California statute, scrutinized in accordance with the *Goldstein* test, must stand. The statute governs only a local labor problem and does not in any manner reshape or reformulate immigration law or policy, and does not prevent, or present an obstacle to the full operation of federal immigration law and policy.

The respondents misconstrue § 274(a)(3) of the Immigration and Nationality Act, 8 U.S.C. 1324(a)(3) as an indication of congressional intent to protect the employers of illegal aliens. Neither the statute on its face nor its legislative history support respondents' claim that § 2805, by prohibiting the knowing employment of illegal aliens, conflicts with § 274(a)(3). The respondents argue that § 2805, by prohibiting the knowing employment of illegal aliens, conflicts with federal law which provides penalties for concealing or harboring illegal aliens. The single federal statute which

respondents argue poses a potential conflict is § 274(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1324(a)(3). It provides that any person who:

> *willfully* or *knowingly conceals, harbors or shields* from detection ... any alien ... not duly admitted ... or not lawfully entitled to enter or reside within the United States ... shall be guilty of a felony ... (Emphasis added).

To prevent the interpretation that employment *per se* would constitute a crime, Congress added a provision to § 274(a)(3):

> Provided, however, that for the purpose of this section, *employment* (including the usual and normal practices incident to employment) *shall not be deemed to constitute harboring.* (Emphasis added).

This proviso, while exempting employment *per se* from the crime of "harboring", does not purport to grant a general exemption from criminal or civil sanctions for employers of illegal aliens. While there has been no specific judicial interpretation of the term "harbor" in § 274(a)(3), an examination of the legislative history demonstrates that the congressional intent was to protect the *innocent* employer from prosecution. According to Senator Kilgore, the author of § 274(a)(3):

> So am I (trying to strengthen the immigration bill), but at the same time I am trying to do it, not at the expense of some man who *unwittingly* or *unknowingly* hires a man he does not know to be a wetback, who may be pretty well into the interior of the country, and who is seeking employment. 98 Cong. Rec. 794 (1952). (Emphasis added)

The legislative history and congressional intent, therefore, do not support respondents' claim that:

> It is thus clear that Congress addressed itself squarely on the issue of employment of aliens not entitled to lawful resident and declared that it was not unlawful. (Respondents' brief, p. 17).

On the contrary, § 274(a)(3) indicates no more than congressional silence regarding a prohibition of *knowing* employment of illegal aliens. It does not express an intent to protect knowing employment of illegal aliens either on its face or in the legislative history. Nor does it express congressional intent to preempt the states from enacting legislation regarding the employment of illegal aliens. Section 2805 recognizes that knowing employment of an illegal alien results in a subversion of the federal regulatory scheme: the conflict posed by respondents is illusory insofar as § 2805 does not conflict with § 274(a)(3) but in fact furthers the purpose of federal law.

Finally, consideration of the bulk of pertinent federal law repudiates any finding of conflict between § 2805 and federal law. Not only does the state statute harmonize with and effectuate the purposes of the federal immigration and related federal labor statutes, but it incorporates the same standards used by the federal government in interpreting § 212(a)(4) to determine when a foreign worker may be admitted to work in the United States. Finally, the effects of § 2805 harmonize with federal law by discouraging the employment of, and illegal entry by, persons not lawfully entitled to presence in the United States. This result complements, not conflicts with, the effect of various federal laws regulating employment and dis-

semination of federal services in denying services and benefits to persons illegally in this country. (See Social Security Act, 45 C.F.R. § 233.50: eligibility limited to citizen and lawfully resident aliens). Ultimately when an alien is not entitled to be in the United States, by definition, such alien is not entitled to work in the United States.[2] When a state law, such as § 2805,

[2]The Court of Appeal of the State of California recently adopted such reasoning in *Alonzo v. State of California Department of Human Resources*, 123 Cal.Rptr.536 (1975) when it upheld the State's denial of unemployment compensation benefits to an illegal alien. The California court rebutted Alonzo's claim that he was entitled to be legally present in the country and thus legally available for employment. The *Alonzo* court held:

> If an alien is here unlawfully, he has no rights under the Constitution of the United States to equal opportunity of employment as enjoyed by lawfully resident aliens (citations omitted) and has no right to work. *Id.* at 540.

Pertinent case law supports the view that employment of aliens is only protected where the alien's presence in the country is lawful. *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Graham v. Richardson*, 403 U.S. 365 (1971). Similarly, the *Alonzo* court found that it was the intent of Congress that citizens and lawful resident aliens be entitled to work in those jobs surreptiously held by illegal aliens. *Id.* at 543. Moreover, the policy of the United States Employment Service of the Department of Labor in administering services is to accept only applications from legally qualified applicants. (20 C.F.R. § 601.1). *Id.* at 544. In sum, on the basis of federal law, congressional intent and federal practice, the *Alonzo* court found:

> A fortiori an individual illegally in this country cannot legally be qualified to work here. *Id.* at 544.

It is manifestly clear that the reasoning supporting *Alonzo* supports our position here. The key factor in the cases is the ascertainment of the alien's legal status pursuant to a state law

prohibits the knowing employment of an illegal alien, the broader purposes of federal law—the exclusion of illegal aliens, is clearly furthered by such state legislation.

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not otherwise involving classifications of aliens. Furthermore, the interest of the State of California in the well-being of its economy and labor force is identical in both cases. As a result of *DeCanas* and *Alonzo*, the California Court of Appeal has articulated a dual legal standard: one for illegal aliens and one for their employers. *See*, dissent of Judge Thomson in *Alonzo. Id.* at 546-47.

CONCLUSION

For the above reasons, the decision below should be reversed.

Respectfully submitted,

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APPENDIX A

1. California Administrative Code, Title 8, part 1, Chapter 8, article 1 § § 16209 through 16209.6:

16209. DEFINITION OF ALIEN ENTITLED TO LAWFUL RESIDENCE.

An alien entitled to lawful residence shall mean any non-citizen of the United States who is in possession of a Form 1-151, Alien Registration Receipt Card, or any other document issued by the United States Immigration and Naturalization Service which authorized him to work.

16209.1 INQUIRY OF APPLICANT FOR EMPLOYMENT.

In ascertaining whether an applicant for employment is not entitled to lawful residence in the United States, an employer shall, contemporaneous with the hiring, make inquiry of such applicant as to whether he is a citizen or an alien.

16209.2 INQUIRY OF EMPLOYEE.

In ascertaining whether an employee is not entitled to lawful residence in the United States, an employer shall make inquiry of such employee as to whether he is a citizen or an alien.

16209.3 APPLICANT OR EMPLOYEE CITIZEN.

If the applicant for employment or employee claims to be a citizen, he may be employed or continued in the employ of the employer upon signing a declaration

under penalty of perjury that he is a citizen of the United States. An employer who knowingly employs an alien not entitled to lawful residence shall not be exonerated from prosecution for violation of Labor Code Section 2805 notwithstanding his having obtained a signed declaration of citizenship from the alien.

16209.4 APPLICANT ALIEN – REQUIREMENT OF PROOF.

If the applicant acknowledges that he is an alien, he shall be requested to produce a document which shows that the applicant is entitled to lawful residence in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The applicant shall furnish such documentation within three days from the day of employment. In the event that he fails to furnish such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.5 EMPLOYEE ALIEN – REQUIREMENT OF PROOF.

If the employee acknowledges that he is an alien, he shall be requested to produce a document which shows that he is entitled to reside in the United States. A document such as specified in Section 16209 shall be sufficient proof of lawful resident status. The employee shall furnish such documentation within three days. In the event that he fails to furnish such documentation and employment is nevertheless continued and he is found to be an unlawful resident, the employer shall be presumed to have had knowledge of the employee's unlawful resident status.

16209.6 DEFINITION OF ADVERSE EFFECT.

Employment of an alien not entitled to lawful residence under any of the following circumstances shall be deemed to have an adverse effect on lawful resident workers:

a. Employment in any category of employment not enumerated on Schedule A in Labor Department Regulations 29 CFR § 60.6 Schedule A may be obtained from the Manpower Administration, U.S. Department of Labor, Washington, D.C.

b. Payment by an employer to such employee of less than the federal or state minimum wage, whichever is higher.